SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 17, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Saxe, Gonzalez, Nardelli, JJ.

3438 Amber Lee Lamanna, Index 21101/00
Plaintiff-Appellant,

-against-

Joseph Jankowski, et al.,
Defendants-Respondents.

Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York (Jamie C. Kulovitz of counsel), for Joseph Jankowski, respondent.

Camacho Mauro & Mulholland LLP, New York (Kathleen M. Mulholland of counsel), for Diakaite Ousseine and France Croissant, Ltd., respondents.

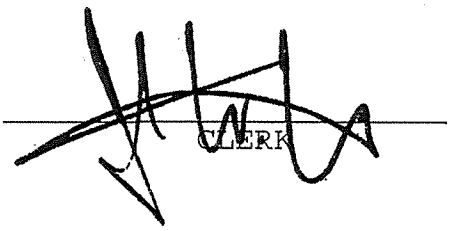
Order, Supreme Court, Bronx County (Nelson S. Roman, J.), entered January 26, 2007, which, in an action for personal injuries sustained in a motor vehicle accident, inter alia, granted defendants' motion to set aside the jury verdict rendered in plaintiff's favor, and directed judgment in defendants' favor as a matter of law, unanimously reversed, on the law and the facts, without costs, and the matter remanded for a new trial.

The jury found that as a result of the motor vehicle accident, plaintiff sustained "a permanent consequential

limitation of use of a body organ or member" (Insurance Law § 5102[d]), yet failed to award any damages for future pain and suffering. Since the failure to award such damages cannot be reconciled with a finding of permanent injury, retrial is mandated on all issues as there is a strong likelihood that the verdict results from a trade-off on a finding of liability in return for a compromise on damages (*see McKenna v Lehrer McGovern Bovis*, 302 AD2d 329, 330 [2003]; *Patrick v New York Bus Serv.*, 189 AD2d 611, 612 [1993]).

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

ENTERED: JUNE 17, 2008



Lippman, P.J., Andrias, Sweeny, Renwick, JJ.

3945 The People of the State of New York, Respondent,

Ind. 10263/95

-against-

Pedro Rodriguez,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Sylvia Wertheimer of counsel), for respondent.

Judgment, Supreme Court, New York County (Charles J. Tejada, J. at suppression hearing; Marcy L. Kahn, J. at jury trial and sentence), rendered March 28, 2006, as amended April 18, 2006, convicting defendant of criminal sale of a controlled substance in the third degree (two counts) and criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 7 to 14 years, unanimously affirmed.

The court properly denied defendant's suppression motion. We do not read any of the language employed by the court in its decision as indicating it misapprehended its role as fact-finder (*cf. People v Delgado*, 80 NY2d 780 [1992]). The evidence adduced at the hearing was sufficient to permit the inference that defendant was arrested because he matched a detailed description provided by an undercover officer who had purchased drugs from

defendant and another man (*see People v Sanchez*, 245 AD2d 105 [1997], *lv denied* 92 NY2d 860 [1998]; *People v Brown*, 238 AD2d 204 [1997], *lv denied* 90 NY2d 1010 [1997]; *see also People v Gonzalez*, 91 NY2d 909, 910 [1998]). We have considered and rejected defendant's remaining arguments.

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

ENTERED: JUNE 17, 2008

Lippman, P.J., Andrias, Sweeny, Renwick, JJ.

3946 Diana Mastroddi, Index 102790/05
Plaintiff-Respondent,

-against-

WDG Dutchess Associates Limited Partnership, et al.,
Defendants,

North Atlantic Industrial Maintenance, Inc.,
Defendant-Appellant.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Michael I. Josephs of counsel), for appellant.

Worby Groner Edelman, LLP, White Plains (Michael L. Taub of counsel), for respondent.

Order, Supreme Court, New York County (Marcy Friedman, J.), entered August 16, 2007, which denied the motion of defendant North Atlantic Industrial Maintenance, Inc. for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

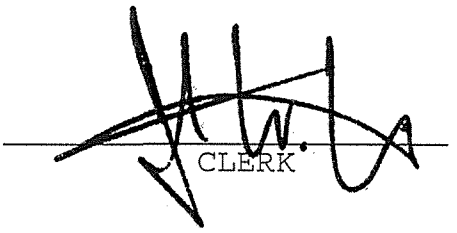
North Atlantic, a snow removal contractor, contends that it owed plaintiff no duty of care because none of the three situations in which a contractual obligation may give rise to tort liability to third persons obtains here (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). However, North Atlantic failed to eliminate all triable issues of fact with respect to any of these situations. It failed to produce the snow removal contract with the premises owner in support of the

argument that its contractual obligation did not displace the owner's duty to safely maintain the premises (*see id.* at 140-141 [2002]; *Schozer v William Penn Life Ins. Co. of N.Y.*, 84 NY2d 639, 643-644 [1994]; *Colbourn v ISS Intl. Serv. Sys.*, 304 AD2d 369 [2003]), and it failed to establish that plaintiff did not detrimentally rely on the continued performance of its snow removal duties (*see Espinal* at 140). In addition, given defendant's silence with respect to the actual snow removal operations and the condition of the parking lot on the relevant date, defendant failed to meet its burden of whether it created or exacerbated a hazard (*see Prendeville v International Service Systems, Inc.*, 10 AD3d 334 [2004]).

Accordingly, since North Atlantic failed to meet its burden on the motion for summary judgment, such motion was properly denied by the Supreme Court regardless of the sufficiency of plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Raynor-Brown v Garden City Plaza Assoc.*, 305 AD2d 572, 573-574 [2nd Dept 2003]).

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

ENTERED: JUNE 17, 2008



Lippman, P.J., Andrias, Sweeny, Renwick, JJ.

3947-
3948 In re Breeyanna S.,

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

Sidney S.,
Respondent-Appellant,

Necola F.,
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

Nancy Botwinik, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for Administration for Children's Services, respondent.

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

Appeal, insofar as taken from orders, Family Court, New York County (Sara P. Schechter, J.), entered on or about December 19, 2006 and July 17, 2007, which continued the subject child's placement with petitioner, approved a plan of reunification with the child's mother, and directed that respondent father's visitation remain supervised, unanimously dismissed as moot, and, insofar as taken from "all orders previously issued in this matter," as limited by the briefs, unanimously dismissed as abandoned, without costs.

The appeal is moot insofar as taken from the December 19,

2006 and July 17, 2006 permanency hearing orders, such orders having been superseded by subsequent permanency hearing orders continuing the child's placement in foster care and discharging her to the mother on a trial basis (*see* 45 AD3d 498, 498 [2007], *lv denied* 10 NY3d 706 [2008]). Contrary to respondent's argument, the appeal does not bring up for review the August 11, 2005 fact-finding determination of neglect. Respondent abandoned the issue of neglect by failing to raise it in his prior appeal from the June 27, 2006 order of disposition (45 AD3d 498, *supra*) (*see Nam Tai Elecs., Inc. v UBS PaineWebber Inc.*, 46 AD3d 486, 486 [2007]; *cf. Matter of Sephaniah A.*, 45 AD3d 386, 386 [2007]). Were we to consider the merits, we would find that a preponderance of the evidence shows that respondent put the child's physical, mental or emotional condition in imminent danger of becoming impaired by continually leaving the child in the mother's care when he went to work although aware of the mother's then long-standing alcohol abuse (Family Ct Act § 1012[f][i][B]; *see Matter of Ashante M.*, 19 AD3d 249 [2005]).

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

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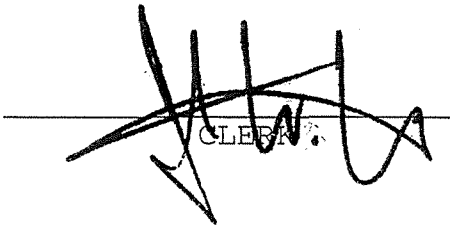


Lippman, P.J., Andrias, Sweeny, Renwick, JJ.

3949 Jasmine Pollock, an infant over the age of 14 years, etc., and Pauline Washington, individually,
Plaintiffs-Appellants,

-against-

Luis Bones,
Defendant,

Boys & Girls Harbor, Inc.,
Defendant-Respondent.

Index 24023/04

David Henry Sculnick, New York, for appellants.

Lester Schwab Katz & Dwyer, LLP, New York (Steven B. Prystowsky of counsel), for respondent.

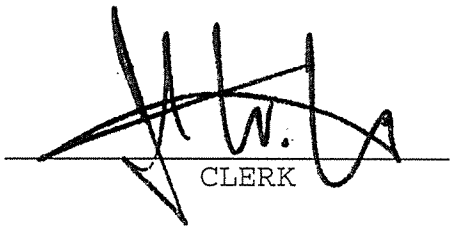
Order, Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered June 13, 2007, which granted the motion of defendant Boys & Girls Harbor, Inc. for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

The record contains no evidence of previous physical altercations between the infant plaintiff and her fellow camper that would have placed defendant day camp on notice that the fellow camper's act that allegedly caused plaintiff's injuries could reasonably have been anticipated (*see Baker v Trinity-Pawling School*, 21 AD3d 272, 274 [2005], *lv dismissed* 7 NY3d 739 [2006]). In any event, the infant plaintiff had left camp at the end of the day and was no longer under the physical

custody and control of defendant's personnel when she was struck by the vehicle (*see Pratt v Robinson*, 39 NY2d 554, 560 [1976]; *Harker v Rochester City School Dist.*, 241 AD2d 937 [1997], *lv denied* 90 NY2d 811 [1997]). Moreover, her running into the street was an independent intervening act "so attenuated from the [camp's] conduct that responsibility for the injury should not reasonably be attributed to [it]" (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 562 [1993]).

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

ENTERED: JUNE 17, 2008



Lippman, P.J., Andrias, Sweeny, Renwick, JJ.

3950 The People of the State of New York, Ind. 342/06
Respondent,

-against-

Carlos German,
Defendant-Appellant.

Epstein & Weil, New York (Lloyd Epstein of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Allen J. Vickey of counsel), for respondent.

Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered August 22, 2006, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him to a term of 3 years, unanimously affirmed.

Defendant's argument that the prosecutor misled defense counsel as to a detective's potential testimony, thereby leading counsel to open the door to allegedly prejudicial evidence, is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. Prior to trial, the prosecutor agreed not to elicit, on direct examination, a portion of defendant's statement to the police as to which there had been a disclosure issue. At trial, the prosecutor abided by this agreement. However, defense

counsel, who had been made aware through the suppression hearing testimony of a different officer of the full content of defendant's statement, elicited the entire statement on cross-examination of the detective. In addition, counsel made affirmative use of the challenged portion of the statement, which was arguably exculpatory. Accordingly, there is no basis upon which to find any misconduct by the prosecutor or prejudice to defendant.

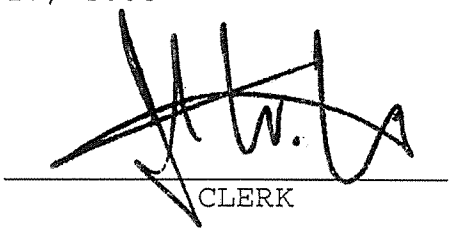
Defendant's challenge to the court's jury charge is also is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The court properly instructed the jury pursuant to *People v Dawson* (50 NY2d 311 [1980]) that a witness has no duty to volunteer exculpatory information to the authorities, and there was nothing prejudicial about the particular language challenged by defendant on appeal.

On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

Trial counsel's failure to raise the issues suggested by defendant on appeal did not cause defendant any prejudice.

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

ENTERED: JUNE 17, 2008



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Lippman, P.J., Andrias, Sweeny, Renwick, JJ.

3952 The People of the State of New York, Ind. 13714/90
Respondent,

-against-

Monserate Maldonado,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Alice Wiseman of counsel), for respondent.

Judgment, Supreme Court, New York County (Robert Haft, J. at plea; Brenda Soloff, J. at sentence), rendered February 28, 2007, convicting defendant of bail jumping in the second degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

The court properly denied defendant's motion to dismiss the indictment, made on the ground of delay in sentencing (*see* CPL 380.30[1]; *People v Drake*, 61 NY2d 359, 364-367 [1984]). After defendant absconded while awaiting sentencing, and the People learned that he was serving a sentence in Puerto Rico, they made reasonably diligent efforts to have him returned to New York. When these efforts failed, defendant was released from custody, and he remained at large in Puerto Rico despite his awareness of his continuing obligation to appear for sentencing in New York. The People's duty to seek production of an incarcerated defendant

is not implicated with respect to the delay that followed defendant's release, during which time he resumed the status of an absconder. Accordingly, the lengthy delay in imposing sentence was "attributable almost entirely to defendant's conduct" (*see People v McQuilken*, 249 AD2d 35 [1998], *lv denied* 92 NY2d 901 [1998]).

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

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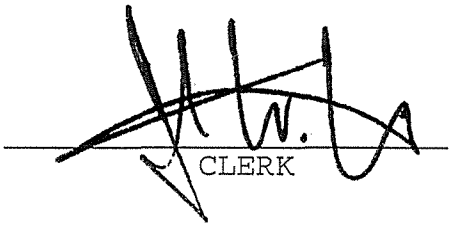

Lippman, P.J., Andrias, Sweeny, Renwick, JJ.

3953 The People of the State of New York by Andrew M. Cuomo, Attorney General of the State of New York, Plaintiff-Respondent-Appellant, Index 404620/06

-against-

Coventry First LLC, et al., Defendants-Appellants-Respondents.

O'Melveny & Myers LLP, New York (Yosef Rothstein of counsel), for Coventry First LLC, The Coventry Group Inc., and Montgomery Capital Inc., appellants-respondents.

Pillsbury Winthrop Shaw Pittman LLP, New York (Mark R. Hellerer of counsel), for Reid S. Buerger, appellant-respondent.

Andrew M. Cuomo, Attorney General, New York (Cecelia C. Chang and Lawrence D. Borten of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Helen E. Freedman, J.), entered September 28, 2007, which denied defendants' motion to dismiss the complaint as it pertains to life settlement transactions by non-New York brokers or to non-New York misconduct, granted the motion with respect to, inter alia, the securities fraud and common-law fraud causes of action, and denied their motion to compel arbitration, unanimously modified, on the law, the common-law fraud cause of action reinstated, and otherwise affirmed, without costs.

The Donnelly Act claim was properly dismissed to the extent that the alleged conduct did not take place "in this state" (*see*

General Business Law § 340[1]; *see also Goshen v Mutual Life Ins. Co.*, 98 NY2d 314, 324-325 [2002]), as was the Martin Act claim with respect to alleged conduct not "within or from this state" (*see* General Business Law § 352-c[1]), and to the extent that it pertained to variable annuity policies already subject to regulation by the Department of Insurance (*see Meagher v Metropolitan Life Ins. Co.*, 119 Misc 2d 615 [1983]). In other respects, these claims, as well as the claim pursuant to Executive Law § 63(12), constituted proper exercises of the State's regulation of businesses within its borders in the interest of securing an honest marketplace (*see Matter of People v Telehublink*, 301 AD2d 1006, 1009-1010 [2003]). The latter cause of action was sufficiently stated; the elements of fraud need not be alleged (*see People v Concert Connection*, 211 AD2d 310, 320 [1995], *appeal dismissed* 86 NY2d 837 [1995]; *see also People v General Elec. Co.*, 302 AD2d 314 [2003]). There were sufficient nonconclusory allegations that the life settlement brokers were agents of the sellers of the insurance policies, thereby imposing upon them the fiduciary prohibition against hidden compensation; the rules governing real estate and insurance brokers are not dispositive. Defendants' actual knowledge of the brokers' wrongdoing may be fairly inferred from

the allegations that defendants participated in and covered up the alleged bid-rigging, supporting the claim for aiding and abetting breach of fiduciary duty (*see Kaufman v Cohen*, 307 AD2d 113, 125-126 [2003]).

The common-law fraud claim should not have been dismissed, since "out-of-pocket" nonspeculative losses were alleged by claims of specific lost sales (*see Bernstein v Kelso & Co.*, 231 AD2d 314, 322 [1997]). The contrary ruling in *Beznicki v Fetaya* (2006 NY Misc LEXIS 979, 2006 WL 1132351), citing our decision in *Bernstein* for the general damages rule but failing to distinguish it, is unpersuasive.

The motion court properly declined to compel arbitration of even the victim-specific claims (*see EEOC v Waffle House, Inc.*, 534 US 279 [2002]; *State of Minnesota v Cross Country Bank*, 703 NW2d 562, 570 [Minn App 2005]). Contrary to defendants' contention, none of the exceptions to the rule against subjecting nonsignatories to arbitration applied (*see e.g. Denney v BDO Seidman, L.L.P.*, 412 F3d 58, 70 [2d Cir 2005]; *Mark Ross & Co., Inc. v XE Capital Mgt., LLC*, 46 AD3d 296 [2007]).

We have considered the parties' other contentions for affirmative relief and find them unavailing.

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

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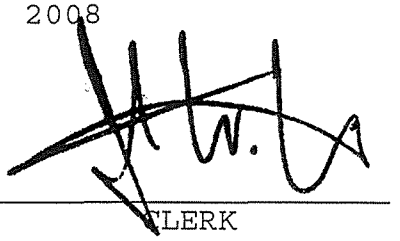

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Lippman, P.J., Andrias, Sweeny, Renwick, JJ.

3954-
3955-
3955A Marden D. Paru, etc., Index 602325/04
Plaintiff-Respondent-Appellant,

-against-

Mutual of America Life Insurance Company,
Defendant-Appellant-Respondent.

Proskauer Rose LLP, New York (Howard Wilson of counsel), for appellant-respondent.

Allegaert Berger & Vogel LLP, New York (Louis A. Craco, Jr. of counsel), for respondent-appellant.

Judgment, Supreme Court, New York County (Bernard J. Fried, J.), entered November 16, 2007, dismissing the second amended complaint and bringing up for review an order, same court and Justice, entered November 1, 2007, which granted defendant's motion to dismiss the second amended complaint pursuant to CPLR 3211(a)(7), unanimously affirmed, without costs. Appeal from above order unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Appeal from order, same court and Justice, entered March 22, 2007, which, inter alia, granted plaintiff's cross motion for leave to file a second amended complaint, unanimously dismissed, without costs.

Plaintiff, an investor in a variable annuity contract (VAC) issued by defendant, claims he suffered damages when other investors in the VAC engaged in so called market timing

transactions. The sole claim in the second amended complaint is that defendant was obligated by the covenant of good faith and fair dealing to take steps to prevent market timing in the funds related to the VAC.

Dismissal of the complaint was appropriate, since the obligation plaintiff sought to imply controverted the express terms of the contract (*see Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268 [2003]). Market timing is a generally lawful investment strategy that uses information about closing prices on securities in foreign exchanges to make advantageous trades on a domestic exchange. Essential to this is the market timer's ability to make transfers between accounts in the VAC by phone or other instantaneous means. Although there is no dispute that had defendant required that all transfers be executed by mail there could have been no market timing in the fund, the parties' agreement expressly permitted transfers to be made by phone, and vested sole discretion concerning the manner in which transfers could be made in defendant. Accordingly, plaintiff's allegation that defendant was required to bar instantaneous transfers is contradicted by the express terms of the agreement (*see Keifer v Sony Music Entertainment, Inc.*, 8 AD3d 107 [2004]), and contrary to plaintiff's contention, the parties' contract was not one of adhesion (*see Brower v Gateway 2000*, 246 AD2d 246, 252 [1998]). In light of the foregoing, we need not reach defendant's argument

that the complaint should also have been dismissed as time-barred. Were we to address it, we would find that the action was timely since the time to commence the action was tolled by the filing of the original punitive class action complaint (*see American Pipe & Constr. Co. v Utah*, 414 US 538, 551-554 [1974]; *Yollin v Holland Am. Cruises*, 97 AD2d 720 [1983]).

Defendant's appeal from the March 2007 order granting leave to plaintiff to file a second amended complaint terminated with entry of the judgment (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). Nor is the order brought up for review from the appeal from the judgment since it does not "necessarily affect[]" the final judgment (CPLR 5501[a][1]). Accordingly, we decline to reach defendant's argument that the second amended complaint was precluded by the Securities Litigation Uniform Standards Act of 1998, 15 USC § 78bb. Were we to reach it, we would agree with the court that neither fraud nor misrepresentation are a "necessary component," either factually or legally, of plaintiff's claim for breach of the covenant of good faith (*see Xpedior Creditor Trust v Credit Suisse First Boston (USA) Inc.*, 341 F Supp 2d 258, 266 [2004]).

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

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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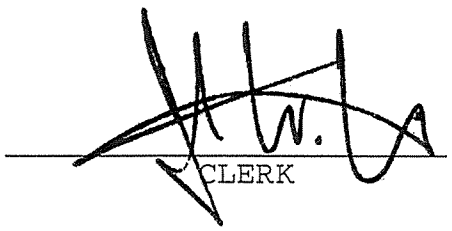


Lippman, P.J., Andrias, Sweeny, Renwick, JJ.

3956 The People of the State of New York, Respondent, Ind. 377/05

-against-

Sanjev Ramnarain, Defendant-Appellant.

Office of the Appellate Defender, New York (Richard M. Greenberg of counsel), and Weil, Gotshal & Manges LLP, New York (Caitlyn M. Campbell of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Deborah L. Morse of counsel), for respondent.

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered December 9, 2005, convicting defendant, after a jury trial, of two counts of burglary in the third degree, and sentencing him, as a second felony offender, to consecutive terms of 3 to 6 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of directing that the sentences run concurrently, and otherwise affirmed.

Defendant did not preserve his challenge to the legal sufficiency of the evidence and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. We further find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. Although defendant refused to sign the trespass notice that clearly and unequivocally informed

him that he was prohibited from entering the premises, since the notice was read to him and placed in his pocket after he had stolen items from the store, the People established that, when he entered the premises on two separate occasions weeks later, he did so knowingly and unlawfully (*see e.g. People v Polite*, 302 AD2d 227 [2003], *lv denied* 99 NY2d 657 [2003]). The actions of the store employees amply satisfied the statutory requirement that such a notice be "personally communicated," (Penal Law § 140.00[5]), and defendant was not entitled to defeat the legal effect of the notice by refusing to pay attention to it.

The court properly exercised its discretion in admitting evidence of a similar uncharged crime, consisting of the shoplifting incident that resulted in the issuance of the notice barring defendant from the store, since it helped establish elements of the crime of burglary in the third degree, namely whether the trespass notice was lawful and whether it was personally communicated to defendant (*see People v Alvino*, 71 NY2d 233 [1987]; *People v Giles*, 47 AD3d 88 [2007]). We reject defendant's contention that the admission of a surveillance videotape and still photographs made from the videotape was excessive and unduly prejudicial. The evidence was relevant to essential elements of the crime and issues raised at trial, and the People "were not bound to stop after presenting minimum evidence but could go on and present all the admissible evidence

available to them, regardless of the trial strategy defendant adopted" (*Alvino*, 71 NY2d at 245; *see also People v Matthews*, 276 AD2d 385, 386 [2000], *lv denied* 96 NY2d 736 [2001]). The court gave appropriate limiting instructions on two separate occasions, and we reject defendant's arguments concerning these instructions.

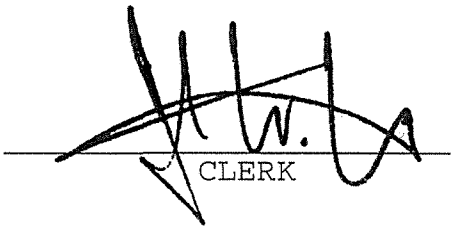
The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Walker*, 83 NY2d 455, 458-459 [1994]; *People v Pavao*, 59 NY2d 282, 292 [1983]). Defendant's theft-related crimes were highly relevant to his credibility, and the court only permitted the People to elicit a fraction of defendant's extensive criminal history.

Defendant failed to preserve his challenge to the court's response to a note from the deliberating jury, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

We find the sentences excessive to the extent indicated.

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

ENTERED: JUNE 17, 2008



Lippman, P.J., Andrias, Sweeny, Renwick, JJ.

3958 Sempra Energy Trading Corp., Index 600322/07
Plaintiff-Appellant,

-against-

BP Products North America, Inc.
Defendant-Respondent,

BP North America Petroleum,
Defendant.

Golenbock Eiseman Assor Bell & Peskoe LLP, New York (Jeffrey T. Golenbock of counsel), for appellant.

Sidley Austin LLP, Chicago, IL (Thomas K. Cauley, Jr., of the Bar of the State of Illinois, admitted pro hac vice, of counsel), for respondent.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered July 20, 2007, which granted defendants' motion pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint, unanimously affirmed, with costs.

Plaintiff commenced this action for breach of contract alleging that defendants delivered fuel oil that failed to comply with the terms of the parties' agreement. Pursuant to the contract, defendants promised to deliver plaintiff fuel oil with an API gravity of 11.3, and the parties agreed that the quality and quantity of the fuel would be determined and certified prior to discharge by a mutually acceptable inspector, and that the

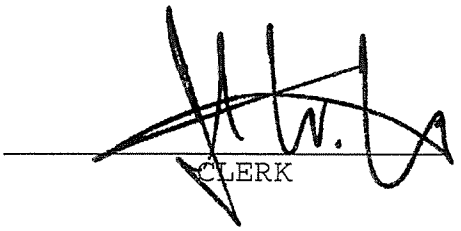
pre-discharge report was binding on the parties except in the event of fraud or manifest error. The record shows that pre-discharge testing of the delivered oil established that the API gravity was in compliance with the parties' agreement. However, post-discharge testing conducted at plaintiff's request revealed the API gravity to be below the specified minimum.

The complaint was properly dismissed, where plaintiff's breach of contract claim was refuted by the documentary evidence, namely the pre-discharge inspection report showing that the delivered fuel oil was in compliance with contract specifications (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]; *150 Broadway Assoc., L.P. v Bodner*, 14 AD3d 1, 5 [2004]). Plaintiff's allegations of manifest error on the face of the official pre-discharge inspection report were properly rejected (*see Matter of Hermance v Ulster County*, 71 NY 481, 486 [1877]; *see also Structured Credit Partners v PaineWebber Inc.*, 306 AD2d 132 [2003]). Plaintiff relied on the post-discharge report, which was not material under the parties' agreement, to allege the possibility of manifest error in the official binding pre-discharge report. Furthermore, plaintiff did not plead its claim for fraud with any

specificity and merely suggested fraud on the part of defendants when loading the fuel (*see* CPLR 3016[b]; *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318-319 [1995]).

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

ENTERED: JUNE 17, 2008



CLERK

Lippman, P.J., Andrias, Sweeny, Renwick, JJ.

3959 The People of the State of New York, Ind. 108/07
Respondent,

-against-

Mohammed Nur,
Defendant-Appellant.

Michael K. Bachrach, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (Christopher P. Marinelli of counsel), for respondent.

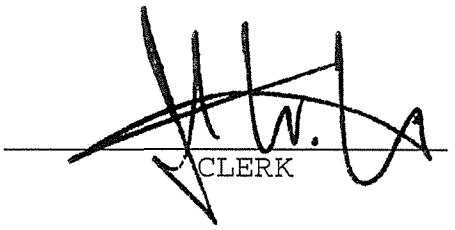
Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered October 26, 2007, convicting defendant, after a jury trial, of robbery in the third degree, and sentencing him, as a second felony offender, to a term of 2½ to 5 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence supports the inference that defendant used physical force against the owner of property for the purpose of compelling him to deliver up the property. A police officer saw defendant assault the victim, and then flee with a bag that was subsequently recovered and sufficiently linked to the victim, who did not testify. There was no evidence that the two men were arguing or trading blows, or that either man had been drinking; there was only evidence that defendant severely beat the victim, disregarded the officer's order not to

move, picked up the bag and ran away with it. The jury could infer from this attack, which had "no apparent motive other than robbery" (*Matter of Merriel B.*, 9 AD3d 256 [2004]; *compare Matter of Niazia F.*, 40 AD3d 292 [2007]), that defendant used force with larcenous intent.

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

ENTERED: JUNE 17, 2008



Lippman, P.J., Andrias, Sweeny, Renwick, JJ.

3961N-
3961NA Paulette Simmons, Individually and as Administratrix of the Estate of Daisy Knowles, Deceased,
Plaintiff-Respondent,

-against-

Northern Manhattan Nursing Home, Inc. doing business as Northern Manhattan Rehabilitation & Nursing Center,
Defendant-Appellant,

North General Hospital,
Defendant.

Index 116077/06

Martin Clearwater & Bell LLP, New York (Claudia J. Charles of counsel), for appellant.

The Cochran Firm, New York (Paul A. Marber of counsel), for respondent.

Orders, Supreme Court, New York County (Milton A. Tingling, J.), entered January 9, 2008, which, in an action for personal injuries and wrongful death arising out of plaintiff's decedent's fall and subsequent care in defendant nursing home, inter alia, denied in part said defendant's motion for a protective order and granted in part plaintiff's cross motion to compel disclosure, unanimously modified, on the law, to strike demand #37, and otherwise affirmed, without costs.

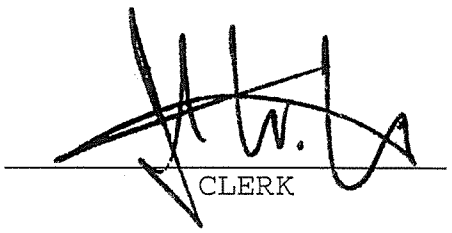
Plaintiff's demands, as time-limited by the court, for (1) negative outcome and incident reports involving conditions and occurrences like those alleged in the complaint, (2) the

personnel files of personnel who treated the decedent, and (3) all documents and information relating to the demotion of any personnel who treated the decedent, are material and necessary (*see generally Anonymous v High School for Envtl. Studies*, 32 AD3d 353, 358 [2006]), and are not overly broad or unduly burdensome inasmuch as defendant is compelled by regulation to maintain and continuously collect "information concerning the facility's experience with negative health care outcomes and incidents injurious to residents" (10 NYCRR 415.15[a][3][I]), and does not deny maintenance of personnel files. Demand #37 for all Quality Assessment and Assurance Committee reports prepared in accordance with 10 NYCRR 415.27(c)(6) relating to the types and conditions and occurrences alleged in the complaint should have been stricken, as such reports are statutorily immune from disclosure (*Matter of Subpoena Duces Tecum to Jane Doe*, 99 NY2d 434, 438-440 [2003]). However, defendant failed to meet its burden of demonstrating that "all documentation of and from" such Committee regarding the decedent relates to the Committee's quality assurance function. Accordingly, demand #36 for such documentation was properly sustained (*see id.* at 439-441; *Kivlehan v Waltner*, 36 AD3d 597, 598 [2007]), subject to the understanding that "documentation" does not include the "reports"

sought in demand #37. We have considered defendant's other arguments, as well as plaintiff's argument that defendant waived any right to claim privilege, and find them unavailing.

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

ENTERED: JUNE 17, 2008



CLERK

Lippman, P.J., Andrias, Sweeny, Renwick, JJ.

3962N Donald G. Fellner, Index 600560/05
Plaintiff-Appellant,

-against-

Masaharu Morimoto,
Defendant-Respondent.

Steven Landy & Associates, PLLC, New York (Steven Landy of counsel), for appellant.

Reed Smith LLP, New York (Gil Feder of counsel), for respondent.

Order, Supreme Court, New York County (Herman Cahn, J.), entered June 14, 2007, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for leave to amend the complaint to (1) add Morimoto, Inc. as an additional defendant; (2) add a cause of action directing defendant to render a full accounting of the business affairs and transactions of Moridon Group, LLC (Moridon); (3) add a cause of action for waste on behalf of plaintiff and Moridon; and (4) impose a constructive trust on the assets of defendant and proposed additional defendant Morimoto, Inc., unanimously reversed, on the law, without costs, and the motion granted.

We reject defendant's contention that no appeal lies from the subject order since the denial of plaintiff's motion seeking, inter alia, leave to amend his complaint is appealable as it "affects a substantial right" (CPLR 5701[a][2][v]). Nor does the court's order constitute, as defendant suggests, an advisory

opinion. Although plaintiff could have sought leave to renew its motion once the decision on the subsequent summary judgment motions was rendered, this does not lead to the conclusion that the order appealed from did not determine the rights of the parties and was one from which there was no right to appeal.

The motion court erred in denying plaintiff leave to amend the complaint (*see* CPLR 3025[b]). There was no undue delay in bringing the motion, and the claims sought to be added arise out of the same facts as those underlying the original complaint (*see Brown v 3392 Bar Corp.*, 2 AD3d 324 [2003]). The original complaint alleges that defendant improperly usurped certain business opportunities and profits rightfully belonging to Moridon, the entity formed by plaintiff and defendant to carry out their business partnership. The proposed claims for waste and for a constructive trust similarly allege that such diversions, in violation of defendant's fiduciary duties, constitute waste and entitle plaintiff to the imposition of a constructive trust on the improperly diverted funds. Moreover, Morimoto, Inc. is wholly-owned by defendant, and accordingly, defendant would not be unduly prejudiced or surprised by its addition as a defendant (*see id.* at 325; *Donovan v All-Weld Prods. Corp.*, 34 AD3d 257 [2006]).

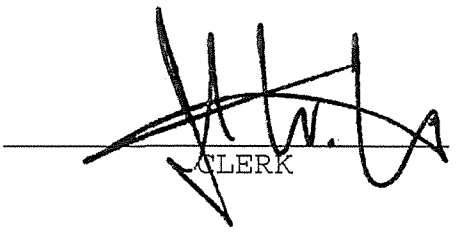
The proposed claims are also not devoid of merit. Regarding the cause of action for the imposition of a constructive trust,

plaintiff sufficiently alleges that certain profits and business opportunities rightfully belonging to Moridon and its members were improperly diverted to defendant and Morimoto, Inc., without consideration, thereby unjustly enriching defendant and Morimoto, Inc., an entity in which plaintiff has no interest (*see Schneidman v Tollman*, 190 AD2d 524 [1993]). As for the cause of action for waste, although such a claim is usually asserted as a derivative one on behalf of the company, "where a wrongdoer has breached an obligation to a shareholder which is independent of any duty owing to the corporation, the shareholder has an individual cause of action" (*Matter of Rudey v Landmarks Preserv. Commn. of City of N.Y.*, 137 AD2d 238, 244 [1988]), and here, plaintiff has adequately alleged a cause of action for waste both on his and Moridon's behalf.

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

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

ENTERED: JUNE 17, 2008



Lippman, P.J., Andrias, Sweeny, Renwick, JJ.

3963N Darsweil Rogers, Index 350389/06
Plaintiff-Appellant,

-against-

Marlyn Rogers,
Defendant-Respondent.

Laurence P. Greenberg, New York, for appellant.

Order, Supreme Court, New York County (Harold B. Beeler, J.), entered December 19, 2007, which, to the extent appealed from as limited by the brief, granted defendant's motion for pendente lite maintenance and child support to the extent of imputing an income of $250,000 to plaintiff and directing plaintiff to: (1) pay unallocated temporary non-taxable maintenance and child support of $5,500 per month; (2) continue paying an allowance of $100 per week to the parties' son; (3) continue paying all carrying charges on the marital residence, including maintenance, condo assessments, rent, mortgage, insurance and all utilities; (4) pay all unreimbursed non-elective pharmaceutical, medical and dental expenses incurred by defendant and the parties' son; (5) maintain in full force and effect all presently existing insurance policies including life, medical and dental on behalf of defendant and the parties' son; and (6) pay college tuition and school related expenses

for the parties's son, and denied plaintiff's cross motion for preclusion sanctions pursuant to CPLR 3126, unanimously affirmed, without costs.

The court properly imputed income to plaintiff based on his well-documented earning history, his present earning potential, and his apparent intentional reduction in his earnings for the purposes of mitigating or avoiding his support obligations (*see Hickland v Hickland*, 39 NY2d 1, 5-6 [1976], *cert denied* 429 US 941 [1976]; *Fruchter v Fruchter*, 29 AD3d 942, 943 [2006]). Notably, plaintiff offers no explanation for his failure to obtain or attempt to obtain comparable employment since the end of 2006, when his severance pay from his prior employer terminated.

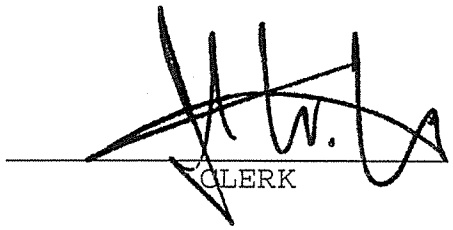
We decline to disturb the pendente lite award, where there is no showing of exigent circumstances, and where the court gave proper consideration to the factors specified in Domestic Relations Law § 236(B)(6) (*see Sumner v Sumner*, 289 AD2d 129, 130 [2001]).

Defendant's request for preclusion sanctions was properly denied, where the record shows that any failure on defendant's part to comply with discovery was not willful, deliberate or in bad faith (*see Maillard v Maillard*, 243 AD2d 448 [1997]).

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 17, 2008



CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

3412 251 CPW LLC, et al., Index 113629/06
Plaintiffs-Appellants,

-against-

257 Central Park West, Inc., et al.,
Defendants-Respondents.

Gale Fieldman, New York, for appellants.

Schechter & Brucker, P.C., New York (David H. Ostwald of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Leland DeGrasse, J.), entered on or about July 23, 2007, which granted defendants' motion for summary judgment and dismissed the complaint, and denied plaintiffs' cross motion for leave to amend, unanimously affirmed, with costs.

The court properly concluded that plaintiffs have not acquired an easement in defendant 257 Inc.'s portion of the alleyway. No easement by prescription exists since there is no showing that plaintiffs' use was hostile and adverse *(see Amalgamated Dwellings, Inc. v Hillman Hous. Corp.*, 33 AD3d 364 [2006]; *Bookchin v Maraconda,* 162 AD2d 393 [1990]; *see also Morales v. Riley,* 28 AD3d 623 [2006]). Nor may an easement be implied from plaintiffs' pre-existing use of the alleyway. Plaintiffs have failed to make a showing of reasonable necessity,

a necessary element for such an easement *(see Turner v Baisley*, 197 AD2d 681 [1993]*)*; use as a "mere convenience" is insufficient *(id.)*.

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

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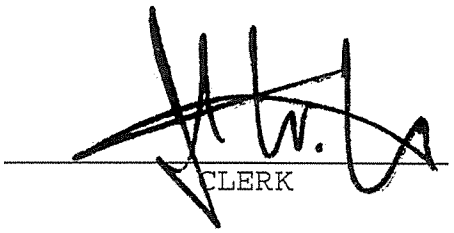

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Tom, J.P., Friedman, Nardelli, Buckley, Renwick, JJ.

3832 Roslyn Knee, etc., Index 105766/07
Plaintiff-Respondent,

-against-

A.W. Chesterton Co., et al.,
Defendants,

The Goodyear Tire & Rubber Company,
Defendant-Appellant.

Lynch Daskal Emery LLP, New York (Scott R. Emery of counsel), for appellant.

Weitz & Luxenberg, P.C., New York (Stephen J. Riegel of counsel), for respondent.

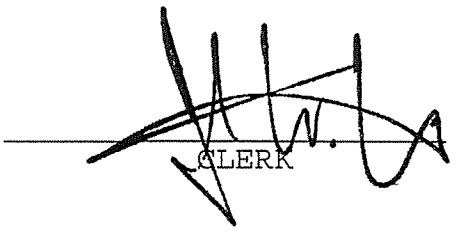
Order, Supreme Court, New York County (Helen E. Freedman, J.), entered October 25, 2007, which denied defendant-appellant's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

The deposition testimony of plaintiff's decedent showed that he was exposed to gaskets and gasket materials containing asbestos while working on a ship known as the Constellation at the Brooklyn Navy Yard, that dust from the asbestos gaskets was pervasive, and that he breathed it. Deposition testimony of the plaintiff and a second witness from an unrelated asbestos litigation and the plaintiff from a second unrelated asbestos litigation describes work involving gaskets on the same ship, under the same conditions, within the same time period, and identifies appellant as the manufacturer of the gaskets.

Appellant was a party in these two other actions and present at all three depositions. We note that one of these witnesses may be available to testify at trial. We reject appellant's argument that these three witness depositions from other actions cannot be used for present purposes (*see Berkowitz v A.C. & S., Inc.*, 288 AD2d 148, 149 [2001]; *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 320 [1996]). These depositions raise an issue of fact as to whether the decedent was exposed to asbestos contained in appellant's gaskets (*cf. Reid v Georgia-Pac. Corp.*, 212 AD2d 462, 463 [1995]).

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

ENTERED: JUNE 17, 2008



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

3859 Maria T., Index 14686/04
Plaintiff-Respondent,

-against-

New York Holding Company Associates, et al.,
Defendants-Appellants.

Morris, Duffy, Alonso & Faley, New York (Pauline E. Glaser of counsel), for appellants.

Kelner & Kelner, New York (Joshua D. Kelner of counsel), for respondent.

Order, Supreme Court, Bronx County (Yvonne Gonzalez, J.), entered March 16, 2007, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion granted and the complaint dismissed. The Clerk is directed to enter judgment in defendants' favor dismissing the complaint.

Plaintiff was a tenant in a building located at 584 Academy Street in Manhattan, owned by defendant New York Holding Company Associates and managed by defendant Metro Management & Development, Inc. In the early afternoon of February 26, 2002, plaintiff entered the building through the lone entrance available to the tenants. A man whom plaintiff did not recognize entered the building immediately after her. The man walked ahead of plaintiff up a staircase, which plaintiff was using to reach her unit on the second floor. As plaintiff opened the door to

her apartment, the man, who had continued up the staircase when plaintiff walked from the staircase to her unit, ran down the staircase and pushed plaintiff into the apartment. The man then sexually assaulted plaintiff at gunpoint.

Plaintiff commenced this action to recover damages for personal injuries, claiming that defendants failed to provide adequate security for the building. Specifically, plaintiff's theory of liability is that defendants failed to maintain a working lock on the door to the tenants' entrance, which failure allowed the assailant to gain entry to the building and assault plaintiff.

Defendants jointly moved for summary judgment dismissing the complaint on the ground that the assault was not foreseeable, arguing that, although there was drug activity in the surrounding neighborhood, there was no history of criminal activity in the building. In opposition, plaintiff submitted evidence demonstrating that, in the four and a half years prior to the assault, several incidents occurred in or near the building to which the police responded. Plaintiff also submitted the affidavit of an expert in the field of premises security who averred, among other things, that the building was in a high crime area and that the assault on plaintiff was foreseeable. In reply, defendants argued that the prior incidents relied upon by plaintiff were not similar to the assault and therefore did not

demonstrate that the assault was foreseeable. Supreme Court, finding a triable issue of fact to exist with respect to the issue of foreseeability, denied the motion.

Building owners and managing agents have a common-law duty to take minimal security precautions to protect tenants from the foreseeable criminal acts of third parties (*see Jacqueline S. v City of New York*, 81 NY2d 288 [1993]; *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507 [1980]; *Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301 [2001]). As Justice Ritter stated for the Second Department in addressing the issue of whether a crime giving rise to a lawsuit was foreseeable to owners and operators of the building in which the crime occurred:

> "[T]here is no requirement 'that the past experience relied on to establish foreseeability be of criminal activity at the exact location where plaintiff was harmed or that it be of the same type of criminal conduct to which plaintiff was subjected', or that 'the operative proof must be limited to crimes actually occurring in the specific building where the attack took place' (*Jacqueline S. v City of New York, supra*, at 294). However, this does not mean that the criminal activity relied upon by the plaintiffs to support their claim of foreseeability need not be relevant to predicting the crime in question.... Rather, to establish foreseeability, the criminal conduct at issue must be shown to be reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location" (*Novikova v Greenbriar Owners Corp.*, 258 AD2d 149, 152-153 [1999]).

Our case law is to the same effect (*see Buckeridge v Broadie*, 5 AD3d 298, 300 [2004]; *see also Wayburn*, 282 AD2d at 303-304; *Brewster v Prince Apts.*, 264 AD2d 611, 614-615 [1999], *lv denied* 94 NY2d 762 [2000]; *Williams v Citibank*, 247 AD2d 49, 51 [1998]; *Todorovich v Columbia Univ.*, 245 AD2d 45, 46 [1997], *lv denied* 92 NY2d 805 [1998]).

Defendants met their initial burden of establishing their entitlement to judgment as a matter of law by making a prima facie showing that the sexual assault committed against plaintiff was not reasonably predictable. In support of their motion, defendants submitted the deposition testimony of three witnesses -- plaintiff, an employee of the managing agent and the superintendent of the building. The deposition testimony of these witnesses established nothing more than that, in the words of the employee of the managing agent, there was "a lot of drug and drug-related activity" in the neighborhood. Moreover, with respect to the building itself, each witness testified that he or she was not aware of any criminal activity in the building prior to the assault committed against plaintiff.

In opposition to the motion, plaintiff submitted police reports indicating that the following criminal activities had occurred in or near the building prior to the assault: (1) on July 5, 1997, a young female tenant was sexually harassed by a male tenant; (2) on March 18, 1998, two police officers, while on

patrol, observed two individuals in the doorway of the building, one of whom was holding a marijuana cigarette, and, upon searching them, the officers discovered that both individuals possessed crack cocaine; (3) on March 14, 1999, a man walking on Academy Street somewhere in the vicinity of the building was shot in the groin by a woman whom the man did not know and could not identify; (4) on August 8, 1999, a man was punched while exiting the building by four individuals; (5) on October 19, 1999, a female tenant received three sexually explicit prank phone calls from an unknown male; (6) on November 24, 1999, a contractor working at the building found two rifles and ammunition somewhere in or near the building; and (7) on October 13, 2000, a tenant's bedroom window was broken when one or more unidentified individuals threw oranges at the window. Plaintiff also submitted the affidavit of an expert in the field of premises security who averred, among other things, that the building was in a police precinct with high rates of crime, the drug activity in the neighborhood "attract[ed] criminal elements to [the] neighborhood" and the assault on plaintiff was foreseeable.

Plaintiff's evidence was insufficient to raise a triable issue of fact with respect to whether the sexual assault was foreseeable, i.e., reasonably predictable. Of the seven prior instances of criminal activity relied upon by plaintiff, only three involved crimes against the person and none are similar to

the sexual assault committed against plaintiff. During the March 18, 1998 incident, police officers observed two individuals standing in the doorway of the building, one of whom was holding a marijuana cigarette; the officers reported that one of the individuals pushed one of the officers when the officers approached the individuals. The March 14, 1999 incident involved a shooting that occurred off the premises on the street somewhere in the vicinity of the building. The August 8, 1999 assault, which occurred approximately two years and seven months prior to the assault committed against plaintiff, involved four individuals punching a man as he exited the building, a markedly different crime than the one to which plaintiff, who was accosted while entering her apartment and sexually assaulted by a lone perpetrator who was a stranger, was subjected. The remaining four instances of prior criminal activity involved the harassment of a tenant by a cotenant, the receipt of prank phone calls by a tenant, the discovery of two rifles and ammunition in or near the building and a misdemeanor entailing minor property damage, none of which are at all similar to the sexual assault committed against plaintiff.

Thus, the sexual assault committed against plaintiff was not reasonably predictable based on the prior criminal activity in or

near the building (*see Buckeridge*, 5 AD3d at 300; *Novikova*, 258 AD2d at 152-153; *see also Todorovich*, 245 AD2d at 46-47; *cf. De Luna-Cole v Fink*, 45 AD3d 440 [2007] [assault of plaintiff in defendants' building was foreseeable since, in the several years preceding the assault, multiple crimes, including assault, armed robbery, burglary and theft, had been committed in the building, and the area in which building was located experienced high rate of crime]; *Rivera v 1652 Popham Assoc.*, 31 AD3d 297 [2006] [triable issue of fact existed regarding whether rape of plaintiff was foreseeable since, among other things, pervasive drug dealing and frequent other criminal activity occurred in the building that was serious enough to warrant regular police vertical patrols of the building]).

Without trivializing the criminal activity in and around plaintiff's building, it must be acknowledged that, with the exception of the shooting that took place on a street somewhere in the vicinity nearly three years earlier, the criminal activity plaintiff relies upon consists of low-level crimes. When one considers that plaintiff includes all the criminal activity in and around the building over a period of more than four and a half years, it also must be acknowledged that the extent of criminal activity plaintiff relies upon is hardly unusual. Justice Ritter made the point well in *Novikova*:

> "As the endless supply of crime statistics attest, crime is a fact of life and is foreseeable. Criminal activity is more frequent in our urban centers, although there are marked differences between neighborhoods. However, the courts have repeatedly held that ambient neighborhood crime alone is insufficient to establish foreseeability" (258 AD2d at 152-153 [citations omitted]).[1]

Justice Sullivan, in determining that the assault of a customer of an ATM facility was not foreseeable to the operator of the facility, made the following related observation: "That a person using an ATM might be subject to robbery is conceivable, but conceivability is not the equivalent of foreseeability. To hold defendant liable for plaintiff's injury would be to stretch the concept of foreseeability beyond acceptable limits [and make defendant an insurer of plaintiff's safety]" (*Williams*, 247 AD2d at 52 [internal quotation marks and citation omitted]). The same holds true here. That a woman entering her apartment in New York

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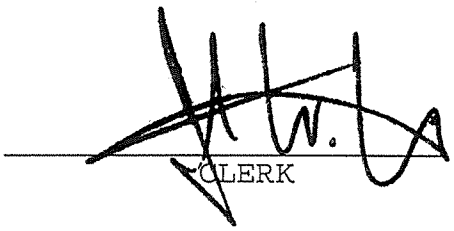
[1]Similarly, this Court has repeatedly recognized that, since building owners and managing agents have neither the capacity nor the duty to protect tenants against neighborhood crime, ambient neighborhood crime is insufficient to establish that a particular criminal act was foreseeable, i.e., reasonably predictable (*see Regina v Broadway-Bronx Motel Co.*, 23 AD3d 255 [2005]; *Buckeridge*, 5 AD3d at 300; *Todorovich*, 245 AD2d at 47).

City might be subject to a sexual assault is conceivable, but conceivability is not the equivalent of foreseeability.

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

ENTERED: JUNE 17, 2008



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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Jonathan Lippman, P.J.
Angela M. Mazzarelli
Richard T. Andrias
Joseph T. Buckley
John W. Sweeny, Jr., JJ.

2274
Ind. 6341/00

The People of the State of New York,
Respondent,

-against-

Ramon Valdez,
Defendant-Appellant.

Defendant appeals from a judgment of the Supreme Court, New York County (Charles H. Solomon, J.), rendered May 8, 2001, convicting him, after a jury trial, of grand larceny in the fourth degree, and sentencing him, as a second felony offender.

Richard M. Greenberg, Office of the Appellate Defender, New York (Daniel A. Warshawsky and Caryn L. Trombino of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Michael J. Balch and Sylvia Wertheimer of counsel), for respondent.

LIPPMAN, P.J.

The original jury in this single witness identification case was unable to reach a verdict upon the count of the indictment charging defendant with grand larceny in the fourth degree (Penal Law 155.30[5]). At the retrial of that count, the prosecutor, immediately after her witness had been sworn and before he had provided any testimony probative of defendant's commission of the charged offense, elicited from him that he had, before joining the police force, served as a paratrooper in the Army; that he had subsequently obtained a Bachelor of Science degree in economics and international finance; that he had during his time as a police officer risen to the level of lieutenant and had been awarded 47 commendations, prominent among them the Department's Medal of Valor, which he received for having been shot in the line of duty; that of the 41,000 officers in the Police Department he had been chosen, not once, but twice, as the sole annual recipient of the "Cop of The Year" award; and that he had nearly completed a Master's degree in history.

Although it is plain that this recitation, portraying the prosecution's fact witness, undoubtedly accurately, as a person of extraordinary attainment, uncommon valor and sterling character, was not properly placed before the jury, particularly at the trial's very outset when no issue as to the witness's

character or capacity for truthfulness had been, or, indeed, could have been raised, the error was the subject only of general objections and accordingly is not preserved for our review as a matter of law (*see People v Tevaha*, 84 NY2d 879 [1994]). Yet, while we ultimately decline to invoke our interest of justice jurisdiction to afford defendant relief, the error merits more than perfunctory address, not simply because it was pronounced, evidently the product of a strategic election in the aftermath of the first trial, and risked the fairness of the proceeding (albeit in the end not irretrievably), but also because the practice of adducing evidence of "background" prematurely to buttress a witness's credibility is not uncommon and it is not difficult to envision a case, not too different from the one at bar, in which commission of this kind of error would require reversal.

It is a basic principle of the law of evidence that a witness's credibility may not be propped or bolstered unless the witness has first been impeached (*see* 1 McCormick on Evidence § 47 [6th ed 2006] ["one general principle, recognized under both case law and the Federal Rules of Evidence, is that absent an attack upon credibility, no bolstering evidence is allowed"]; *see also* Prince, Richardson on Evidence § 6-502 [Farrell 11th ed]; Fisch, New York Evidence § 491 [2d ed]). "The rationale is that

we do not want to devote court time to the witness's credibility and run the risk of distracting the jury from the historical merits unless and until the opposing attorney attacks the witness's credibility" (McCormick, *supra*).

While the elicitation of some "background" information to provide context for the testimony of the People's witness would have been permissible, "[i]n New York, in general, accreditation of a witness in advance of impeachment is disallowed," and "[a] witness' good character for truthfulness may not be proven in the absence of an attack on such character" (Barker and Alexander, Evidence in New York State & Federal Courts §§ 6:36, 6:37 [2001 ed]). Here, the prosecutor, in advance of any other testimony, drew from her lay fact witness a curriculum vitae that would naturally have encouraged a reasonable juror to conclude that the witness was a person of unimpeachable character and, by easy if not sound inference, a highly credible historian of the events in issue. This was not a mere technical divergence from the proper order of proof.

The theory of the defense was not that the People's witness lied, much less that his capacity for truth telling was deficient. It was rather that the witness had been mistaken - that he had not been situated so as to accurately observe and comprehend the conduct at issue, which, according to his own

testimony, at its outset, unfolded rapidly some two blocks away from him on the diagonally opposite sidewalk, in a location that may well have been only intermittently visible to him given the likely intervening presence of weekday morning pedestrian and vehicular traffic. The defense cross-examination was entirely consistent with this theory and did not seek to impugn the officer's basic honesty (*cf. People v Grady*, 40 AD3d 1368, 1373 [2007], *lv denied* 9 NY3d 923 [2007] [any error in permitting a police witness prematurely to "bolster his own credibility with evidence of good character" was mitigated by the circumstance that the officer's credibility was subsequently "vociferously" attacked]). And, although it is true that defendant's attorney suggested in summation that the People's witness had persisted in an accusation of which he was uncertain to protect his reputation, it is only fair to observe that this suggestion would not and could not have been made had the evidence of the officer's reputation not been gratuitously injected into the case by the prosecution. Defendant denied the theft and gave testimony which at points conflicted with that of his accuser, but "the mere contradiction of the witness . . . [does not] authorize the admission of evidence of good reputation" (Prince, Richardson on Evidence § 6-502 [Farrell 11th ed]). Indeed, were the threshold for the admission of evidence of character so low,

trials would be routinely mired in collateral inquiries.

We cannot agree with the People's appellate contention that the testimony respecting their witness's background and achievements was admissible because it was relevant, since education and experience "affect" the reliability and accuracy of a person's observations. Even if the testimony had been relevant, it would not therefore have been admissible. Whether one characterizes the disputed evidence as evidence of character or education and experience, its conceded purpose was to enhance or bolster the witness's credibility, and, as noted, bolstering is not permitted unless and until the witness has been impeached. Even then, it is closely circumscribed; it must bear some reasonable relation to the impeachment. A witness's life experience does not become admissible simply because the accuracy of his observation on one occasion has been called into question or because his account has in some respects been contradicted. Moreover, while education and experience may "affect" a person's powers of observation, it is not by any means clear what significance should reasonably attach to such factors. Certainly, there appears no reason to suppose that an accumulation of advanced degrees will render one a more reliable observer or relator of street crime. Nor is there reason to suppose that one's opportunity accurately to observe a particular

transaction will be improved by a valorous history. When all is said and done, the People's witness was called not as an expert but as a fact witness and his testimony in that capacity was not properly heralded by his resume. In its mimicry of a recital of expert qualifications and in its luminous yet largely irrelevant content, the "background" testimony was distracting and potentially misleading. Nonetheless, however strongly we may disapprove of the introduction of such a hazard into this case, a close review of the record leaves us unable to conclude that the potential for prejudice was ultimately realized so as to deprive defendant of a fair adjudication.

While, as noted, the accuracy of the prosecution witness's account of the larceny itself might be questioned, since it occurred at a distance of nearly two blocks and at a point that may well have been at least intermittently obscured from his view, the record discloses no ground to doubt the accuracy of the witness's account of the immediately ensuing events in which the occurrence of the larceny was confirmed and its perpetrator brought within easy observational range. The officer testified that in the immediate aftermath of what he had from his vantage point taken to be a theft of a pedestrian's shoulder bag, the individual he had supposed to be the thief, a tall man with salt-and-pepper hair, came running in his direction, pursued by the

individual he had supposed to be the shoulder bag's rightful owner, a much smaller, slight man with dark hair. The larger man, as he ran, clutched the shoulder bag that the officer believed he had seen taken from the smaller man, and as the two men rapidly closed the distance between themselves and the officer, the officer could hear the smaller man yelling for the larger man to stop. Just as the two men reached the corner diagonally opposite the officer's vantage point, the officer observed the larger man, now no more than 25 feet away, throw the bag to the ground. The smaller man immediately retrieved the bag, and the larger man continued running, crossing the intersection of 181st Street and Fort Washington Avenue and then turning east on 180th Street. The officer testified that he followed the larger man, first in his car and later on foot, continuously from the intersection of 181st Street and Fort Washington Avenue until the man's eventual apprehension on 180th Street near Wadsworth Avenue, losing sight of him only briefly. The apprehended individual was defendant.

Plainly, the jury's decision to credit this essentially unchallenged account of the larceny's immediate aftermath is not plausibly understood as having been actuated by the objectionable testimony. Had there been some reason, apart from defendant's bare denial of the theft, to doubt the accuracy and reliability

of the observations upon which the officer's inculpatory testimony was based, our conclusion as to whether the bolstering testimony had ultimately proved benign might well be different. If, for example, the entire proof of the larceny had consisted of the officer's observation at a distance of two blocks of what he thought had been a taking by defendant, it would not be possible to conclude with similar confidence that the jury's decision to credit the officer's testimony had not been attributable to the testimony having been bolstered. Here, however, the completely unimpeached testimony respecting the officer's close observation of the events stemming from and circumstantially confirming in the most unambiguous way both the larceny and defendant's role as its perpetrator, affords us no ground to infer that the jury, in crediting the officer's account of the theft, made a determination that it would not have made had the objectionable testimony been kept from it.

From what has been said, it should be clear that we, upon our own review of the record, perceive no basis to conclude, as defendant contends, that the evidence was misweighed by the jury (see *People v Bleakley*, 69 NY2d 490, 495 [1987]). Nor do we find merit in defendant's remaining contention, that his challenge for cause to a juror whose grandfather had been a police officer and who admitted "an emotional regard" for police officers, should

have been granted. When questioned by the trial court as to whether she could be fair despite her strong feelings for her grandfather, the juror replied that she could, and on this record we cannot say that the court erred in crediting her response and finding it a sufficiently unequivocal declaration of impartiality (*see People v Shulman*, 6 NY3d 1, 27 [2005], *cert denied* 547 US 1043 [2006]).

Accordingly, the judgment of the Supreme Court, New York County (Charles H. Solomon, J.), rendered May 8, 2001, convicting defendant, after a jury trial, of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, should be affirmed.

All concur except Andrias and Buckley, JJ. who concur in a separate Opinion by Andrias, J.

ANDRIAS, J. (concurring)

While I agree that defendant's conviction should be affirmed and that his present "bolstering" claim is unpreserved for review due to the lack of proper objection to the prosecutor's purportedly unduly lengthy introduction of Lieutenant DeStefano, the People's principal witness, I cannot agree that anything untoward occurred here. Nor do I agree that the lieutenant's testimony about his background and accomplishments was irrelevant, distracting, potentially misleading, or a collateral issue gratuitously injected into the case by the prosecution.

Here, there was no bolstering as that term is generally understood, and certainly no prejudice to defendant. Rather, the prosecutor began her direct examination of Lieutenant DeStefano, as she did without objection at the first trial, by accrediting her witness, as all good trial lawyers are trained to do (*see e.g.*, Mauet, Trial Techniques 6th ed, § 5.2, at 96-100 [2002]). Since jurors know nothing about a witness beforehand, introductory questions are useful because they let the jurors know what to expect. Thus, whenever a witness takes the stand for the first time, counsel's first order of business on direct examination is to let the jury know who the witness is, why the witness is there, and why the witness should be believed. The jurors want to know a little bit about the witness so that they

have an initial basis for assessing credibility. "Simple background questions should be asked of all witnesses, because credibility is always an issue" (Mauet at 100). Thus, without violating the character evidence rules, counsel can elicit background facts that create a favorable impression of the witness (Carlson & Imwinkelried, Dynamics of Trial Practice, Problems and Materials 2nd ed [1995] at 176).

Whether the background should be developed further depends on who the witness is and how important the witness's testimony is. In New York, the general rule is that all relevant evidence is admissible; however, even if technically relevant, testimony may still be excluded "if its probative value is substantially outweighed by the danger that it will unfairly prejudice the other side or mislead the jury" (*People v Scarola*, 71 NY2d 769, 777 [1988]). As with all testimony, it is up to the trial court, in the exercise of its discretion, to determine issues of relevancy, and there is no indication that such discretion was improvidently exercised here. Significantly, defense counsel never articulated a reason why such questions were objectionable, and after she specifically objected on grounds of relevancy, the court, although overruling the objection after the prosecutor said it was her last background question, directed the prosecutor to move on.

Any attempt to characterize the central issue in this case as merely one of perception or accuracy of the arresting officer's observations misses the point. The jury was presented with diametrically opposing versions of events. Defendant testified that he came to the neighborhood to look for work; that he decided to jog around a nearby park; and that he was simply running down the street to a smoke shop to buy cigarettes when he was accosted for no apparent reason by the off-duty lieutenant, who, after a bizarre conversation, ordered defendant arrested for bag snatching. The lieutenant, on the other hand, testified that he was off duty and was stopped at a traffic light when he saw defendant snatch a bag from an unidentified man about a block and a half away; that he then saw the victim chase defendant down the street right in front of the lieutenant's car; that defendant dropped the bag and continued running, whereupon the victim picked up the bag and walked off, never to be found again; that he took up the chase and eventually wrestled defendant to the ground before he was placed under arrest by police officers who responded to the lieutenant's 911 call. Plainly and simply, this trial was all about credibility. As noted by my learned colleagues, defense counsel conceded as much in her summation by implicitly, albeit not directly, attacking the lieutenant's credibility, when she suggested that he persisted in an

accusation of which he was uncertain in order to protect his reputation in his precinct.

As in *People v Grady* (40 AD3d 1368, 1373 [2007], *lv denied* 9 NY3d 923 [2007]), where the defendant contended that the People should not have been permitted to bolster the credibility of one of the arresting officers by eliciting from him testimony concerning past acts of heroism and his receipt of commendations, the lieutenant's testimony here was brief, consisting of three pages out of a total of 62 pages of testimony, did not constitute hearsay, and was not improperly exploited in the prosecutor's summation. Indeed, it was defense counsel who twice referred to the lieutenant's background in summation as a reason to discredit his testimony. Finally, the court gave the jury the standard instruction that the lieutenant's testimony was to be given no more credence than that of any other witness simply because he was a police officer.

Since the jury was charged with having to decide which of two starkly contrasting stories to credit, it was not inappropriate for the prosecutor to present her witness in the best light. Likewise, once defendant chose to testify in his own defense, it was appropriate for defense counsel to present him in the best possible light. Defendant's present argument is a curious twist of the *Sandoval* concept in that he seeks not to

limit the prosecutor's questioning *of him* regarding his prior criminal background, but proposes to restrict the jury's ability to evaluate the officer's credibility. This is standing the concept of "prejudice" on its head.

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

ENTERED: JUNE 17, 2008