SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 10, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Nardelli, Catterson, Moskowitz, Renwick, JJ.

339N Sendar Development Co., LLC, etc., Index 600731/07
Plaintiff-Respondent,

-against-

CMA Design Studio P.C., etc., et al.,
Defendants-Respondents,

Kevin H. Sweeney, P.E.,
Defendant-Appellant,

R&L General Contracting, Inc., et al.,
Defendants.

Milber Makris Plousadis & Seiden, LLP, White Plains (Leonardo D'Alessandro of counsel), for appellant.

Kaplan Landau LLP, New York (Eugene Neal Kaplan of counsel), for Sendar Development Co., LLC, respondent.

Gogick, Byrne & O'Neill, LLP, New York (Stephen P. Schreckinger of counsel), for CMA Design Studio P.C., respondent.

Morgan Melhuish Abrutyn, New York (Anthony D. Grande of counsel), for Breger Terjesen Associates, respondent.

Goldberg Segalla LLP, Buffalo (Christopher J. Belter of counsel), for R&L Construction, Inc., respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered April 22, 2008, which denied defendant Sweeney's motion to dismiss the amended complaint and cross claims against

him, unanimously reversed, on the law, with costs, the motion granted and the amended complaint and all cross claims against said defendant dismissed. The Clerk is directed to enter judgment accordingly.

In 1998, plaintiff Sendar Development Co., LLC acquired a six-story residential building on the Upper West Side of Manhattan. The following year, plaintiff decided to expand the building by adding five additional floors to the top of the building. Subsequently, plaintiff and its agent Jadam Equities, Ltd. (Jadam) hired defendants CMA Design Studio P.C. (CMA), Breger Terjesen Associates (Breger), and Kevin H. Sweeney, P.E. (Sweeney) to design the expansion and supervise the contractors, defendants R&L Construction, Inc. (R&L) and Williams Panel Brick (Williams).

Plaintiff hired CMA and Breger to design the expansion; that is, to prepare, approve, and sign off on the architectural plans for the expansion. Both CMA and Breger agreed to supervise, inspect, approve the construction of the expansion, including the exterior walls, and provide contract administration services for the project. Furthermore, Breger proposed using the EZ Wall system for the exterior of the project; this is the central point of dispute in this action.

R&L was hired by plaintiff to assemble and install the EZ

Wall system, which consists of brick face tile with mortar joints, adhered to a continuous anodized metal support panel laid against a continuous vapor barrier membrane. This is supported by building sheathing constructed of layers of gypsum boards. The gypsum boards, along with the light gauge metal studs, are connected to the metal support panels to form the building's exterior. The record reflects that Sweeney's scope of work, as specified in his contract, was to provide structural engineering services solely for the framing of the additional five floors.

Prior to the expansion being completed in October 2002, the title to the building was transferred from plaintiff to the condominium association. In Spring of 2004, two years after the expansion was completed, hallway tiles began to crack and water leaked in around the apartment windows in the expansion area. In July 2004, Sweeney was again hired by plaintiff but was asked only to inspect the cracking and leaks. He determined that there was no structural cause for the cracking and the leaks, and was paid $650 for the inspection.

Following Sweeney's 2004 inspection, severe water leakage continued throughout the entire building. Independent engineering consultants were called in to inspect the building and they found that the leaks were caused by serious defects in the EZ Wall system. They also determined that the system was

improperly installed and was not suitable for this application. The experts found that the entire facade needed to be replaced at a substantial cost. Plaintiff agreed to replace the existing wall system, and, in exchange, the condominium association assigned to plaintiff its litigation rights.

On June 26, 2007, plaintiff filed an amended complaint against Sweeney, CMA, Breger, R&L, and Williams, alleging 15 causes of action, including breach of contract, negligence, and indemnification. CMA, R&L, and Breger asserted cross claims for contribution and/or indemnification against all the co-defendants including Sweeney. On August 16, 2007, Sweeney moved to dismiss the amended complaint and cross claims against him.

In support of his motion, Sweeney, on the basis of his contract, asserted, inter alia, that he did not agree to indemnify any other party, that his contract specified he was required to provide structural engineering services only for the light gauge steel framing of the expansion, and that his contract expressly excluded services such as site visits, inspections, shop drawing review, and panel drawing review. Although Sweeney admitted that he verbally agreed to provide additional services related to the written agreement such as controlled inspections, Sweeney contends that these controlled inspections were required by the New York City Building Code in connection solely with the

structural construction of the light gauge steel framing, and not for parts of the project or construction designed or specified by other design professionals relating to the exterior wall system.

Sweeney further demonstrated that his work was completed on October 11, 2002, when he sent a letter to the New York City Department of Buildings (DOB) requesting a letter of final completion. He received the letter of final completion from the DOB a month later. Sweeney, by providing documentary evidence of the date he completed his work, asserts that plaintiff's claims are time-barred since it commenced its action in March 2007 almost two years after the three-year statue of limitations had expired in October 2005.

In opposition, plaintiff stated that since Sweeney inspected the expansion in Spring 2004, its claim did not accrue until then and, thus, its cause of action is not time-barred. Plaintiff claims that the statute of limitations was tolled by the continuous representation doctrine since the inspection in 2004 clearly shows that Sweeney continued his professional responsibility to plaintiff. Plaintiff submitted the affidavit of the building manager, Michael Alejandro, who stated that while Sweeney did not find any structural cause for the leakage and cracking during his inspection in 2004, a more thorough inspection of the facade would have revealed early signs that the

EZ Wall system was indeed failing. Lastly, plaintiff stated that additional discovery was needed in order to afford it to develop and show that Sweeney's Spring 2004 inspection was a step in the continuous and interrelated service that Sweeney provided.

The motion court agreed with plaintiff and denied Sweeney's motion to dismiss, rejecting Sweeney's assertion that plaintiff's complaint was time-barred. It found that the issues present in the motion could not be resolved without discovery in order "to at the very least determine who did what and under what circumstances."

For the reasons set forth below, we reverse the order and dismiss the amended complaint since plaintiff commenced its action after the statute of limitations expired, and the continuous representation doctrine, for the purpose of tolling the statute of limitations, is not applicable.[1]

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[1] We reject plaintiff's contention that this appeal should be dismissed as moot since, subsequent to the issuance of the order on appeal, it served a second amended complaint which Sweeney answered. Since this Court was not furnished with a copy of this particular amended complaint, we cannot determine whether the amended pleading does indeed render this appeal moot (*Pier 59 Studios L.P. v Chelsea Piers L.P.*, 27 AD3d 217 [2006]; *American Express Travel Related Servs. Co. v North Atl. Res., Inc.*, 261 AD2d 310, 310-311 [1999]). In any event, plaintiff's description of the second amended complaint, namely that it contains additional allegations concerning Sweeney's structural design, does not show that plaintiff *substantively* altered its original complaint (*See Munn v New York City Hous. Auth.*, 202 AD2d 210, 211 [1994]).

It is well established that a cause of action against a design professional, whether the claim is based upon breach of contract or malpractice, is to be brought within a three-year statute of limitations (*See* CPLR 214). "An owner's claim against a design professional accrues upon the termination of the professional relationship between the parties, when the designer completes its performance of significant (i.e. non-ministerial) duties under the parties' contract" *(Parsons Brinckerhoff Quade & Douglas v EnergyPro Constr. Partners*, 271 AD2d 233, 234 [2000]). After the completion of work, a relationship between the owner and design professional on an incidental matter that does not relate to the contractual duties between the parties will not extend the completion date (*See State of New York v Lundin*, 60 NY2d 987, 989 [1983]).

If the action is commenced after the statute of limitations expires, a plaintiff may be able to avoid dismissal by asserting that the statute of limitations is tolled by the continuous representation doctrine, or at least showing that there is an issue of fact as to its application (*860 Fifth Ave. Corp. v Superstructures - Engrs. & Architects*, 15 AD3d 213 [2005]). The doctrine applies when a plaintiff shows that he or she relied upon an uninterrupted course of services related to the particular duty breached *(id.* at 214). However, "[t]he mere

recurrence of professional services does not constitute continuous representation where the later services performed were not related to the original services" *(Hall & Co. v Steiner & Mondore*, 147 AD2d 225, 228-229 [1989]).

In the case at bar, Sweeney provided documentary evidence that he completed his work in October 2002. Sweeney's final invoice for his services was on October 8, 2002. Furthermore, Sweeney sent a letter to the DOB requesting a letter for final completion which he received. Plaintiff does not dispute that the work was completed in October 2002. Since Sweeney's contractual duties provided that he was responsible only for the light gauge steel framing of the expansion, he showed that he had completed it in October 2002. The Spring 2004 inspection, on the other hand, was for an incidental matter not related to Sweeney's contractual duty of providing structural engineering for the light gauge steel framing. Thus, it does not extend the completion date of October 2002.

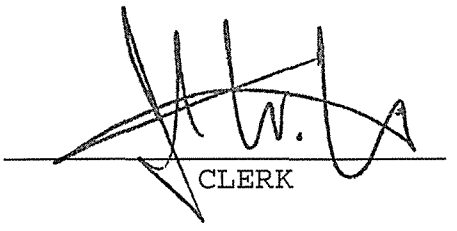
Further, plaintiff has not established that the continuous representation doctrine applies, nor has it shown that there is an issue of fact as to its applicability. The Spring 2004 inspection was not related to Sweeney's original professional services nor was it part of any ongoing services. Plaintiff has not shown that Sweeney continuously provided inspection over the

exterior wall systems. While Sweeney concedes that he verbally agreed to provide controlled inspection, it was limited to the light gauge steel framing for which Sweeney was responsible and not for the exterior wall systems, which was the responsibility of the other defendants. Sweeney's contract expressly provides that his scope of duty does not cover inspections. Furthermore, plaintiff has not shown that Sweeney provided any services between October 2002 and Spring 2004.

Since plaintiff's claim for breach of contract and negligence is time-barred, we do not need to address plaintiff's claim for common-law indemnification. Further, codefendants' cross claims for contribution against Sweeney should be dismissed since contribution is unavailable where a plaintiff's direct claims against a codefendant seek only a contractual benefit of the bargain recovery, tort language notwithstanding (see *Board of Mgrs. of the 195 Hudson St. Condominium v 195 Hudson St. Assoc., LLC* , 37 AD3d 312 [2007]).

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

ENTERED: DECEMBER 10, 2009



Gonzalez, P.J., Friedman, McGuire, Degrasse, Manzanet-Daniels, JJ.

1711 Skip Funt, Index 124501/01
Plaintiff-Appellant,

-against-

Human Resources Administration
of the City of New York,
Defendant-Respondent.

Skip Funt, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Sharyn Rootenberg of counsel), for respondent.

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered March 13, 2009, which denied plaintiff's motion for summary judgment and granted defendant's cross-motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Dismissal of this pro se action alleging negligent failure to provide assistance to avert eviction was proper as the Human Resources Administration was not a proper party (*see* NY City Charter § 396; *Siino v Department of Educ. of the City of N.Y.*, 44 AD3d 568 [2007]), the notice of claim was not served within ninety days after plaintiff's claim arose (General Municipal Law §§ 50-e[1][a]), i.e., the date of plaintiff's eviction, plaintiff did not seek leave to serve a late notice of claim (General Municipal Law § 50-e[5]), and the action was commenced more than

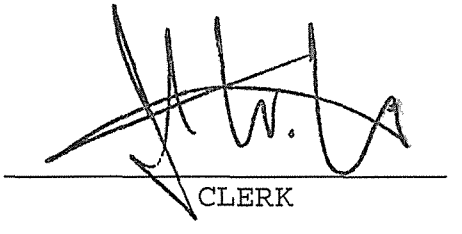
one year and ninety days after plaintiff's eviction (General Municipal Law § 50-i[1][c]).

Even had timely service of the notice of claim and commencement of the action been made on the proper party, dismissal would be warranted as plaintiff failed to establish the existence of a special relationship between himself and the agency so that the City could be held liable for the discretionary acts of its employee (*Pelaez v Seide*, 2 NY3d 186, 193 [2004]). The court properly found that plaintiff failed to establish that the actions of defendant's caseworker constituted the assumption of a special duty toward plaintiff or that plaintiff justifiably relied upon the caseworker's words or actions (*see Kovit v Estate of Hallums*, 4 NY3d 499, 506-07 [2005].

Nor is the doctrine of res judicata, based upon plaintiff's fair hearing, applicable herein, as the disposition therein was not on the merits and did not cover the negligence claims.

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

ENTERED: DECEMBER 10, 2009



CLERK

Gonzalez, P.J., Friedman, McGuire, DeGrasse, Manzanet-Daniels, JJ.

1712 The People of the State of New York, Ind. 3337/07
Respondent,

-against-

Jose Padilla,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Jalina J. Hudson of counsel), for appellant.

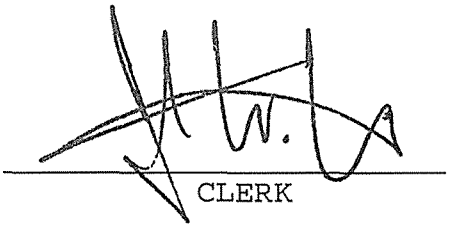
Robert M. Morgenthau, District Attorney, New York (Philip J. Morrow of counsel), for respondent.

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

ENTERED: DECEMBER 10, 2009



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

Gonzalez, P.J., Friedman, McGuire, DeGrasse, Manzanet-Daniels, JJ.

1715 John Cahn, Index 106110/04
Plaintiff-Respondent-Appellant,

-against-

Ward Trucking, Inc.,
Defendant-Respondent,

R.C. Dolner, LLC, et al.,
Defendants,

Taconic Management Company,
LLC, et al.,
Defendants-Appellants-Respondents.

- - - -

[And A Third-Party Action]

- - - -

J.T. Falk & Company, LLC,
Second Third-Party Plaintiff,

-against-

Atlantic Coastal Trucking,
Inc., et al.,
Second Third-Party
Defendants-Respondents.

Law Office of James J. Toomey, New York (Evy L. Kazansky of counsel), for appellants-respondents.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for respondent-appellant.

Downing & Peck, P.C., New York (John M. Downing, Jr. of counsel), for Ward Trucking, Inc., respondent.

Quirk and Bakalor, P.C., New York (Debra E. Seidman of counsel), for Atlantic Coastal Trucking, Inc. and Triangle Trucking, respondents.

Order, Supreme Court, New York County (Michael D. Stallman,

J.), entered March 12, 2008, which, inter alia, (1) granted the motion of second third-party defendants Atlantic Coastal Trucking, Inc., and Triangle Trucking (collectively "Triangle") to dismiss plaintiff's second amended complaint as against them as time-barred, and (2) denied the cross motion of defendants Taconic Management Company LLC and 450 Park Avenue South Associates, LLC (collectively, "Taconic") to strike the answers of Triangle and defendant Ward Trucking, Inc. ("Ward"), unanimously modified, on the facts, to the extent of finding that Ward failed to comply with court orders directing disclosure and that such noncompliance was willful and contumacious, and directing that as a sanction Ward is precluded at trial from denying that it delivered the subject drums to the building where the injury occurred, and otherwise affirmed, without costs.

Plaintiff alleges that, on March 12, 2003, as he was walking in the lobby of the building where he works, a large drum of chemical solution fell off a shipping pallet and struck his leg, injuring him. Plaintiff commenced this action in April 2004, asserting claims in negligence against, inter alia, Taconic, the building's owner, and Ward, the company that plaintiff believed had delivered the drum to the building. Unbeknownst to plaintiff and the other parties to the action, except Ward, the drums had actually been delivered to the building by Triangle, another

trucking company, pursuant to a standing Cartage Agreement between Ward and Triangle. Although Ward and Triangle were independent companies with no common officers, shareholders, or employees, Ward relied exclusively on Triangle to make all of its deliveries in New York City, and the two companies had facilities at the same address in New Jersey. The two companies also sometimes shared trailers pursuant to an Interchange Agreement. Triangle had access to Ward's computer system for purposes of inputting delivery information, and Triangle used Ward's delivery receipts when making deliveries on Ward's behalf.

Pursuant to the Cartage Agreement, Triangle had Ward named as an additional insured on a liability policy issued by New Jersey Manufacturers Insurance Company. In a November 2003 letter, plaintiff's attorneys advised Ward of plaintiff's claim and requested that Ward forward their letter to its attorney; instead, Ward forwarded the letter to Triangle with its own letter to Triangle, dated November 17, 2003, requesting that Triangle and its insurer contact plaintiff's attorneys and advise them of Triangle's "involvement" and Ward's "non-involvement."

On July 1, 2005, plaintiff served a set of discovery demands on all defendants, among which was a request for all incident-related insurance policies and "reports" made in the regular course of business. Ward responded on July 8, 2005, stating that

the policies would "be provided" and that there were no such reports. In the latter regard, Ward argues that its letter was not a report made in the regular course of business because it did not deliver the drum. Ward also answered at least one discovery demand in a manner that was misleading in that it obscured Triangle's involvement in making the delivery of the drum that allegedly injured plaintiff.

In August 2005, November 2005, and March 2006, Supreme Court issued conference orders directing defendants to produce all outstanding requested documents, including insurance-related documents. However, Ward did not produce the policy under which it was being represented until December 2006. Furthermore, there is no evidence that the November 2003 letter from Ward to Triangle was produced prior to Ward's May 2007 deposition.

In June 2007, plaintiff served a second amended complaint asserting claims against Triangle. Because more than three years had passed since the incident, Triangle moved to dismiss the complaint as time-barred. Taconic cross-moved for, among other things, an order striking Ward's answer for its willful failure to timely disclose Triangle's involvement in the incident.

Supreme Court correctly granted Triangle's motion to dismiss the second amended complaint as time-barred. Because Ward did not exercise control over Triangle's delivery of the drums, and

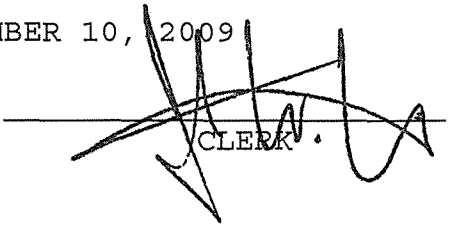
because Ward may have been independently negligent in its handling of the drums prior to transferring them to Triangle, the parties have differing defenses to plaintiff's claims, and therefore are not "united in interest" for purposes of the relation-back doctrine (*Raymond v Melohn Props., Inc.*, 47 AD3d 504, 505 [2008]; *Xavier v RY Mgt. Co., Inc.*, 45 AD3d 677, 679 [2007]).

The circumstances, including Ward's generally evasive responses to plaintiff's demands and close business relationship with Triangle, compel a finding that Ward's unexplained delay in producing a copy of Triangle's New Jersey Manufacturers insurance policy in contravention of three court orders directing its production, and inadequately explained delay in producing its November 2003 letter to Triangle reporting plaintiff's claim, were a willful and contumacious withholding of disclosure until after the three-year statute of limitations had run, in an attempt to hide Triangle's involvement in the incident and shield Triangle from exposure to liability.

We have considered and rejected appellants' other arguments.

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

ENTERED: DECEMBER 10, 2009



Gonzalez, P.J., Friedman, McGuire, DeGrasse, Manzanet-Daniels, JJ.

1716 The People of the State of New York, Respondent, Ind. 3963/07

-against-

Anthony Perkins, Defendant-Appellant.

Stanley Neustadter, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (Matthew C. Williams of counsel), for respondent.

Judgment, Supreme Court, New York County (Charles J. Tejada, J. at hearing; Edward J. McLaughlin, J. at jury trial and sentence), rendered May 20, 2008, convicting defendant of robbery in the second degree (five counts), burglary in the first degree, and burglary in the second degree (two counts), and sentencing him, as a persistent violent felony offender, to an aggregate term of 100 years to life, unanimously modified, as a matter of discretion in the interest of justice, to the extent of directing that the sentences for the convictions of second-degree robbery under the first and second counts of the indictment be served concurrently with each other and with all other sentences, resulting in a new aggregate term of 50 years to life, and otherwise affirmed.

The verdict was based on legally sufficient evidence and was

not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning identification and credibility. Defendant was reliably identified by crime victims, inculpated by an acquaintance, and connected to the crimes by extensive circumstantial evidence including cell phone records. The physical injury element of first-degree burglary was established by evidence that defendant hit the victim on the nose with a pistol and knocked her down, causing bruising and pain in her nose and shoulder which led her to take pain relievers for a week. The jury could reasonably infer that these injuries caused "more than slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]), and went beyond "petty slaps, shoves, kicks and the like" (*Matter of Philip A.*, 49 NY2d 198, 200 [1980]).

The court properly denied defendant's suppression motion. Defendant's sister consented to a search of her apartment, where defendant had been temporarily living. In a closet, the police found an imitation pistol, along with clothing belonging to defendant, wrapped in a bedsheet. For the first time on appeal, defendant argues that his sister lacked actual or apparent authority to consent to a search of this bundle, which he

characterizes as a container holding his personal belongings (*see* (*see People v Gonzalez*, 88 NY2d 289 [1996]). Defendant's only suppression argument was that the seizure was the fruit of an unlawful arrest. Accordingly, the People were never placed on notice of any need to develop the record as to the status of the bundle and the sister's actual or apparent authority to consent to its examination by the police (*see People v Martin*, 50 NY2d 1029 [1980]; *People v Tutt*, 38 NY2d 1011 [1976]). While the hearing court stated in its decision that the sister had authority to consent to a search of her *apartment*, that did not "expressly decide[]" (CPL 470.05[2]) the issue presented on appeal. Moreover, even the court's limited ruling on the question of consent was not made in response to a protest by a party (*see People v Colon*, 46 AD3d 260, 263 [2007]). We decline to review this unpreserved issue in the interest of justice. As an alternative holding, we find that, to the extent the hearing record permits review, it establishes that the sister possessed, or at least reasonably appeared to possess, common authority with defendant over the closet and its contents, including the bundled bedsheet (*see People v Loomis*, 17 AD3d 1019 [2005], *lv denied* 5 NY3d 830 [2005]; *People v Castillo*, 131 AD2d 495, 496 [1987], *lv denied* 70 NY2d 749 [1987]).

We find the sentence excessive to the extent indicated.

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

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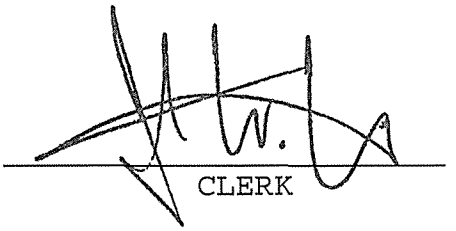

Gonzalez, P.J., Friedman, McGuire, DeGrasse, Manzanet-Daniels, JJ.

1718 Administration for Children's Services on behalf of Vicki Steadman,
Petitioner-Respondent,

-against-

West Sanford,
Respondent-Appellant.

Kenneth M. Tuccillo, Hastings-On-Hudson, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondent.

Order, Family Court, New York County (Lori Sattler, J.), entered on or about May 28, 2008, which denied respondent putative father's objections to the Support Magistrate's order denying his motion to vacate the underlying order of support, unanimously reversed, on the law and the facts, without costs, the objections granted, and the support order vacated.

The parties do not dispute that the mother, having given up custody of her child, had no child-support rights to assign to petitioner, and the latter thus lacked standing to bring this action (*see McKinney & Son v Lake Placid 1980 Olympic Games*, 61 NY2d 836 [1984]; *National Fin. Co. v Uh*, 279 AD2d 374 [2001]). Respondent asserted the defense of lack of standing in a motion to vacate the support order made within days of being assigned counsel in 2006. Prior to that, in 2001 and 2004, he had written

letters to the Magistrate advising that the mother did not have custody and that her application for support was thus improper and illegal, but these letters were disregarded as improper in form. Under these circumstances, we find pro se respondent's letters constituted applications within the meaning of Family Court Act § 451.

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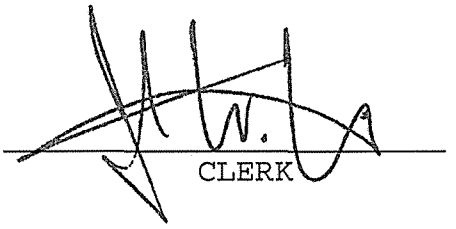
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: DECEMBER 10, 2009



Gonzalez, P.J., Friedman, McGuire, DeGrasse, Manzanet-Daniels, JJ.

1719 The Board of Managers of the 1235 Park Condominium, et al., Plaintiffs-Appellants, Index 111794/07

-against-

Clermont Specialty Managers, Ltd., et al., Defendants-Respondents.

Turek Roth Mester LLP, New York (Charles L. Mester of counsel), for appellants.

White Fleischner & Fino, LLP, New York (Nancy Davis Lyness of counsel), for respondents.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered April 10, 2008, which, upon the parties' motions for summary judgment, declared that defendants (collectively, the insurer) have no duty to defend and indemnify plaintiffs (collectively, the insured) in an underlying action for personal injuries sustained by a worker on the insured's premises, unanimously affirmed, without costs.

The worker was taken to the hospital by ambulance after falling off a ladder while installing a water tank on the roof of the insured's building; the insured immediately learned of the accident; and the insured's notice of claim was admittedly untimely. The insured argues that the untimeliness should be excused because it had a reasonable, good-faith belief that no

claim would be asserted against it, based on a phone call it made to the worker's employer on the day of the accident in which it was informed that the worker was not admitted to the hospital, did not sustain any serious injuries, and was expected to return to work the next day. Given the nature of the work that the worker was performing and the insured's knowledge that the worker had fallen off a ladder and been taken to the hospital by ambulance, this single phone call on the day of the accident was not an adequate inquiry into the circumstances of the accident and its outcome, and, as a matter of law, could not have caused the insured to reasonably believe that there was no reasonable possibility of the policy's involvement (*see Great Canal Realty Corp. v Seneca Ins. Co.*, 5 NY3d 742, 744 [2005]; *Paramount Ins. Co. v Rosedale Gardens*, 293 AD2d 235, 239-240 [2002]; *SSBSS Realty Corp. v Public Serv. Ins.* Co., 253 AD2d 583, 585 [1998]). Nor is there merit to the insured's argument that the recent amendment to Insurance Law § 3420(a) adding paragraph 5 (L 2008, ch 388, § 2, eff Jan 17, 2009), requiring a showing of prejudice before an insurer denies coverage on the ground of untimely notice, applies retroactively to the instant 2003 policy; the amendment expressly applies to policies issued on or after its

effective date (*id.*, § 8; *see Safeco Ins. Co. of Am. v Discover Prop. & Cas. Ins. Co.*, 2009 US Dist LEXIS 18735, *14, n 3, 2009 WL 436329, *5 (SD NY 2009).

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

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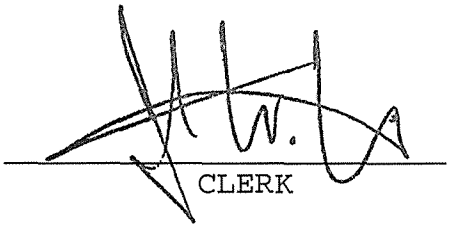


Gonzalez, P.J., Friedman, McGuire, DeGrasse, Manzanet-Daniels, JJ.

1720-
1721 Nella Manko, Index 109296/07
Plaintiff-Appellant,

-against-

Dr. Dana Mannor, et al.,
Defendants-Respondents,

Lenox Hill Hospital, etc., et al.,
Defendants.

Nella Manko, appellant pro se.

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Elliott J. Zucker of counsel), for Dr. Dana Mannor, Matthew Lubin, Alan Tikotsky and David Follett, respondents.

Kaufman Borgeest & Ryan LLP, Valhalla (Tracey A. Reiser of counsel), for Elton Strauss, respondent.

Orders, Supreme Court, New York County (Alice Schlesinger, J.), entered February 15, 2008, which granted the motions to dismiss the complaint as against the individually named defendants, unanimously affirmed, without costs.

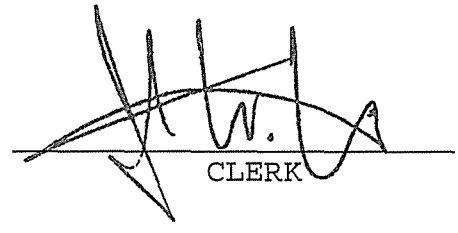
The alleged medical malpractice occurred in 2002 and the action was not commenced until July 2007, which was well beyond the 2½-year statute of limitations (CPLR 214-a). Additionally, the complaint failed to state a cause of action against defendant Strauss (*see DiMitri v Monsouri*, 302 AD2d 420 [2003]), and the claims against Mannor, Lubin and Tikotsky are barred by the

doctrine of res judicata in light of our 2008 ruling (*Manko v Mannor,* 55 AD3d 471, *lv denied* 13 NY3d 704) affirming the dismissal of a similarly belated earlier action against those defendants.

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

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

ENTERED: DECEMBER 10, 2009



Gonzalez, P.J., Friedman, McGuire, DeGrasse, Manzanet-Daniels, JJ.

1723 The People of the State of New York, Respondent,

Ind. 3277/98

-against-

Alfred Diaz,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Matthew C. Williams of counsel), for respondent.

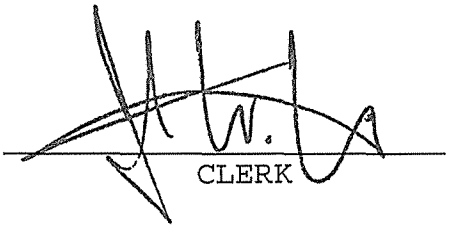
Order, Supreme Court, New York County (Charles J. Tejada, J.), entered on or about December 4, 2007, which, to the extent appealed from as limited by the brief, denied defendant's motion for resentencing pursuant to the Drug Law Reform Act of 2004 (L 2004, ch 738), unanimously reversed, on the law, and the matter remanded for a de novo determination.

As the People concede, a remand is necessary on defendant's application for resentencing as to his convictions for criminal sale of a controlled substance in the first degree (*see People v Rampino*, 55 AD3d 348 [2008]) because the DRLA required the court to offer defendant an opportunity for a hearing and bring him

before it, notwithstanding that he is also serving a concurrent sentence of equal length for his first-degree conspiracy conviction, upon which he is ineligible for resentencing.

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

ENTERED: DECEMBER 10, 2009



Gonzalez, P.J., Friedman, McGuire, DeGrasse, Manzanet-Daniels, JJ.

1724-
1724A
1724B In re Deivi R., and Others,

Children Under the Age of
Eighteen Years, etc.,

Marcos R.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

Steven N. Feinman, White Plains, for appellant.

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

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

Order of disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about November 13, 2008, which, upon a finding that respondent father neglected Helvis U., and derivatively neglected Deivi R. and Marvis R., released the children to non-respondent mother, with supervision by petitioner Administration for Children's Services for a period of six months, unanimously affirmed, without costs. Order of protection, same court and Judge, entered on or about November 13, 2008, which directed respondent to stay away from and not communicate with Helvis until the child's 18th birthday,

unanimously affirmed, without costs. Order of protection, same court and Judge, entered on or about January 21, 2009, which, inter alia, directed respondent to stay away from and not communicate with Deivi and Marvis, except in connection with court ordered visitation with the children, unanimously dismissed, as moot, without costs.

A preponderance of the evidence supports the finding that respondent neglected Helvis by inflicting excessive corporal punishment upon him (*see* Family Ct Act § 1012[f][i][B]). The record shows that Helvis told the caseworker that he was afraid of respondent since respondent regularly hit him, including in the back with a belt which produced a red mark that lasted for a week, and punched him in the face (*see Matter of Maria Raquel L.*, 36 AD3d 425 [2007]; *Matter of Jason G.*, 3 AD3d 340 [2004], *lv denied* 2 NY3d 702 [2004]). These out-of-court statements were sufficiently corroborated by the mother, who testified that respondent slapped Helvis' face on several occasions in the presence of the other children, and on one such occasion left a mark that lasted for three days and caused his eye to swell. The mother also reported instances when respondent, upon discovering that Helvis had wet the bed, forced him to wash his clothes and

take a shower in cold water (*see* Family Ct Act § 1046[a][vi]; *Matter of Nicole V.*, 71 NY2d 112, 118-19 [1987]; *Matter of Corey C.*, 20 AD3d 736 [2005]; *Matter of Sabrina M.*, 6 AD3d 759, 761 [2004]).

Respondent's contention that the mother's corroboration of the child's testimony was insufficient because the mother changed her story, is unavailing. The mother testified that she initially lacked the courage to reveal the truth because she feared respondent and was worried that she would be evicted from her apartment if the violence in the home were revealed. However, according to the mother, during the 10-month interval between the two dates of her testimony she developed the courage to tell the truth since respondent's violence increased and she began to understand the detrimental effects of such violence on her children. The court credited the mother's testimony, and there exists no basis to disturb the court's credibility determinations (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]).

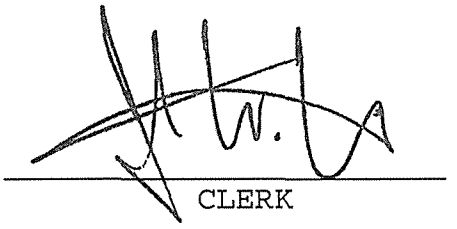
Respondent's use of excessive corporal punishment against Helvis supports the findings of derivative neglect as to the younger children (*see* Family Ct Act § 1046[a][i]; *Matter of Jason G.*, 3 AD3d at 340).

Regarding the orders of protection, in view of the foregoing, the order issued in favor of Helvis should not be

disturbed. Furthermore, the appeal from the order issued in favor of Deivi and Marvis is dismissed as moot because the period it was to be in effect has expired (*see Matter of Jamal A. v Valentina V.*, 46 AD3d 389 [2007]).

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

ENTERED: DECEMBER 10, 2009



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Gonzalez, P.J., Friedman, McGuire, DeGrasse, Manzanet-Daniels, JJ.

1725N Kevin West, et al., Index 107708/06
Plaintiffs-Appellants,

-against-

332 East 84th Owners Corp.,
Defendant-Respondent.

Stern & Zingman LLP, New York (Mitchell S. Zingman of counsel), for appellants.

Rosen Livingston & Cholst LLP, New York (Bruce A. Cholst of counsel), for respondent.

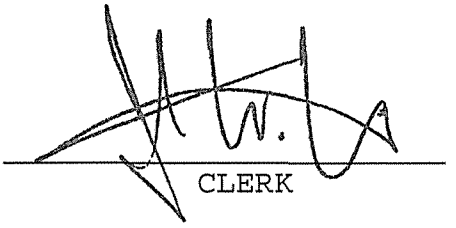
Order, Supreme Court, New York County (Edward H. Lehner, J.), entered February 20, 2009, which, upon reargument, adhered to the original determination denying plaintiffs' motion for summary judgment and granting defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

The record raises no issues of fact whether the board's reason for denying plaintiffs' request to construct a new bathroom in their apartment, i.e., that it would violate a recently enacted building policy to prohibit "wet" construction over "dry" space, was legitimately related to the welfare of the cooperative and therefore a reasonable basis for withholding

consent (*see Seven Park Ave. Corp. v Green*, 277 AD2d 123 [2000], *lv denied* 96 NY2d 853 [2001]; *Rosenthal v One Hudson Park*, 269 AD2d 144 [2000]). Plaintiffs submitted no evidence that the space below the proposed bathroom was not "dry" or that the policy prohibiting "wet-over-dry" construction was unreasonable or applied in an arbitrary or discriminatory manner.

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

ENTERED: DECEMBER 10, 2009



Tom, J.P., Nardelli, McGuire, Acosta, DeGrasse, JJ.

4717-
4717A-
4717B

Gloria Doomes, etc.,
Plaintiff-Respondent,

-against-

Best Transit Corp., et al.,
Defendants,

Warrick Industries, Inc.,
doing business as Goshen Coach,
Defendant-Appellant.

- - - -

Ana Jiminian, etc.,
Plaintiff-Respondent,

-against-

Best Transit Corp., et al.,
Defendants,

Warrick Industries, Inc., doing business
as Goshen Coach,
Defendant-Appellant.

- - - -

Kelli Rivera,
Plaintiff-Respondent,

-against-

Best Transit Corp., et al.,
Defendants,

Warrick Industries, Inc., doing business
as Goshen Coach,
Defendant-Appellant.

Index 16893/94
16954/96
17408/94

Shaub Ahmuty Citrin & Spratt LLP, Lake Success (Steven J. Ahmuty, Jr., of counsel), for appellant.

Kahn Gordon Timko & Rodriques, P.C., New York (Nicholas I. Timko of counsel), for Gloria Doomes, respondent.

Trolman, Glaser & Lichtman, P.C., New York (Michael T. Altman of counsel), for Ana Jiminian, respondent.

Shramko & DeLuca, LLP, Hudson (Jonathan D. Shramko of counsel), for Kelli Rivera, respondent.

Judgments, Supreme Court, Bronx County (Stanley Green, J.), entered October 25, August 2 and June 20, 2007, after a joint trial, insofar as appealed from, awarding the Doomes, Jiminian/Nunez and Rivera plaintiffs damages for pain and suffering as against defendant Warrick Industries, unanimously reversed, on the law and the facts, without costs, and the complaints dismissed as against defendant Warrick Industries. The Clerk is directed to enter an amended judgment accordingly.

In 1994, a bus driver fell asleep at the wheel while driving on a highway at approximately 60 miles per hour. The bus, which was manufactured by Warrick from a chassis produced by defendant Ford Motor Company, moved across the highway, from the right-hand lane into the passing lane and then onto the median strip and a sloping embankment before rolling over several times after the driver woke up and tried to steer the bus back to the roadway. Plaintiffs, who were among the 19 injured passengers, alleged negligence, strict product liability and breach of warranty,

contending that when the driver suddenly woke up, he was unable to regain control of the bus because, with its redesigned chassis, the bus was overweight and misbalanced, with too much weight over its back. Plaintiffs also sought to hold Warrick liable on the ground of its failure to equip the bus with seatbelts to protect the passengers. Following a joint trial of the claims of some of the plaintiffs, the jury found, in part, that Warrick was liable for the accident because it lengthened the original Ford chassis and failed to install seatbelts.

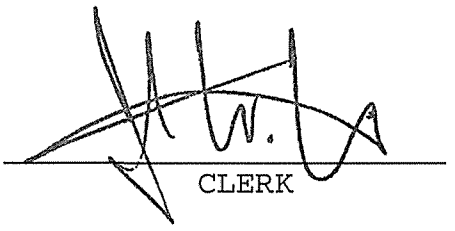
Before trial, Warrick moved unsuccessfully to preclude evidence as to the alleged negligence or product defect attributed to the lack of passenger seatbelts. The National Traffic and Motor Vehicle Safety Act of 1966 prescribes uniform national standards. When read together with the regulatory scheme prescribed by the Secretary of Transportation, as set forth in Federal Motor Vehicle Safety Standard (FMVSS) 208 (49 CFR 571.208), this standard requires manufacturers to equip vehicles with certain restraints, depending on the type, weight and age of the vehicle. This bus was governed by S4.4.2 of FMVSS 208, pursuant to which only the driver's seat was required to be fitted with a seatbelt. Although the federal enactment does preserve the right, in some instances, to a common-law remedy (49 USC § 30103[e]), a suit alleging the failure to install airbags

is preempted (*Geier v American Honda Motor Co.*, 529 US 861 [2000]; *see also Chevere v Hyundai Motor Co.*, 4 AD3d 226, 227 [2004], *lv denied* 3 NY3d 612 [2004]). Similarly, the state tort law rule for which plaintiffs argue -- one that effectively would require seatbelts at passenger seating positions for all buses governed by FMVSS 208 -- is preempted because it conflicts with the federal goal of establishing uniform standards (*see Surles v Greyhound Bus Lines, Inc.*, 2005 WL 1703153, *6, 2005 US Dist. LEXIS 45765, *17-18 [ED Tenn 2005]).

As for the weight distribution claim, not only was there no credible nonspeculative evidence concerning the vehicle's weight or its distribution, but plaintiffs' own expert engineer acknowledged that the accident was unrelated to the extension of the chassis, and admitted there was no proof it had been caused by anything other than the driver's inattentiveness.

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

ENTERED: DECEMBER 10, 2009



Mazzarelli, J.P., Nardelli, Catterson, DeGrasse, Roman, JJ.

1575 The People of the State of New York, Ind. 29650C/05
Respondent,

-against-

James Conyers,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Alexis Pimentel of counsel), for respondent.

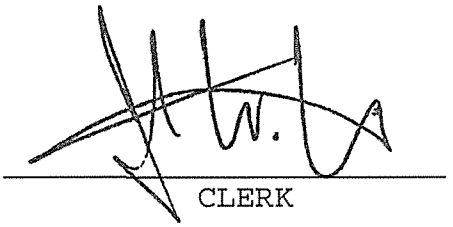
Order, Supreme Court, Bronx County (Megan Tallmer, J.), entered on or about January 14, 2008, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Regardless of whether defendant's correct point score would make him a presumptive risk level one or two offender, the court properly found clear and convincing evidence of aggravating factors to support its discretionary upward departure to level three. The risk assessment instrument (RAI) did not adequately account for the fact that defendant's prior guilty plea to manslaughter in the first degree stemmed from the strangulation of two elderly victims. Other aggravating factors not addressed by the RAI are defendant's attempt to deceptively portray himself

as a police officer in committing the current offense; his engagement in the subject criminal acts for monetary gain and his failure to accept responsibility for his conduct. These additional factors support the court's discretionary upward departure from the presumptive risk level set forth in the RAI (*see e.g. People v Schlau*, 60 AD3d 529 [2009], *lv denied* 12 NY3d 712 [2009]).

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

ENTERED: DECEMBER 10, 2009



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Mazzarelli, J.P., Andrias, Saxe, Catterson, Acosta, JJ.

1729 Marion Stewart, Index 111381/05
Plaintiff-Appellant,

-against-

Steven A. Odrich, M.D.,
Defendant-Respondent,

Marc G. Odrich, M.D., et al.,
Defendants.

Richard A. Engelberg, Plainview, for appellant.

LeClairRyan, P.C., New York (Neil H. Ekblom and Afaf S. Sulieman of counsel), for respondent.

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered December 14, 2007, upon a jury verdict, in favor of defendant Steven A. Odrich, M.D., unanimously affirmed, without costs.

Viewing the evidence in the light most favorable to defendant and according due deference to the fact-finding function of the jury and its assessment of the credibility of the witnesses, we find that the verdict was based on a fair interpretation of the evidence (*see Lopez v New York City Tr. Auth.*, 60 AD3d 529 [2009]). The jury could reasonably have concluded that, based upon the testimony of defendants' expert doctors and the other medical evidence, defendant had not

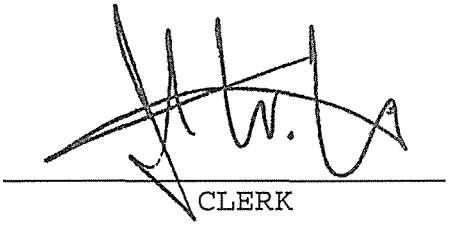
departed from acceptable standards of care and treatment by glaucoma specialists.

The brevity of the jury's deliberations alone did not undermine plaintiff's right to a fair trial. Plaintiff has come forward with no affirmative proof that would rebut the presumption of regularity to which the jury's verdict is entitled (*see Carolan v Altruda*, 17 AD2d 211, 213 [1962], *affd* 15 NY2d 1010 [1965]; *People v Marcano*, 199 AD2d 86, 87 [1993]).

We reject plaintiff's contention that the judgment is inconsistent with the evidence.

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

ENTERED: DECEMBER 10, 2009



CLERK

Mazzarelli, J.P., Andrias, Saxe, Catterson, Acosta, JJ.

1730 The People of the State of New York, Ind. 7741/02
Respondent,

-against-

Michael Shaw,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Vincent Rivellese of counsel), for respondent.

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered June 10, 2008, convicting defendant, after a jury trial, of rape in the first degree and burglary in the first degree, and sentencing him, as a second violent felony offender, to consecutive terms of 12½ to 25 years and 3½ to 7 years, unanimously affirmed.

The court did not violate defendant's right of confrontation when it received two declarations by the nontestifying victim in which she described being raped, since neither declaration was testimonial. The victim died before defendant was identified, years later, by means of DNA evidence. At trial, the sole issue was consent.

The first declaration was made to a police officer who responded shortly after the crime. This statement was not

testimonial, because it was primarily made "to enable police assistance to meet an ongoing emergency" (*Davis v Washington*, 547 US 813, 822 [2006]; *People v Nieves-Andino*, 9 NY3d 12 [2007]; *People v Smith*, 37 AD3d 333 [2007], *lv denied* 8 NY3d 950 [2007]). Rather than gathering information about past events for the purpose of future prosecution, the officer's primary purpose was to ascertain what had happened and deal with the danger posed to other persons in the area by a knife-wielding suspect who had just committed a violent crime, and who might have still been nearby. A second aspect of the ongoing emergency was the officer's need to learn the facts in order to determine whether the victim required prompt medical assistance.

The second declaration at issue was made to a gynecologist who examined the victim at a hospital. This was not testimonial, because the doctor acted primarily as a treating physician (*see People v Duhs*, 65 AD3d 699 [2009]), and her role in gathering evidence for the police by way of a rape kit was secondary. Although the gynecologist prepared a sexual assault form and questionnaire as part of the rape kit, that was not received in evidence.

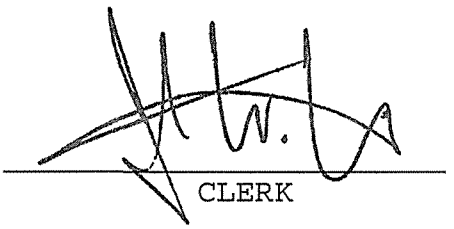
In any event, any error in receiving either or both declarations was harmless, since these declarations were cumulative to unchallenged declarations made to other persons,

and since there was overwhelming evidence establishing the element of force (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant's trial counsel did not render ineffective assistance by failing to challenge the constitutionality under *Apprendi v New Jersey* (530 US 466 [2000]) of the procedure by which the court imposed consecutive sentences, since such a challenge would have been unavailing (*see Oregon v Ice*, 555 US __, 129 S Ct 711 [2009]).

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

ENTERED: DECEMBER 10, 2009



CLERK

Mazzarelli, J.P., Andrias, Saxe, Catterson, Acosta, JJ.

1731 Jonas Macedo, Index 108316/06
Plaintiff-Respondent, 85252/06

-against-

J.D. Posillico, Inc.,
Defendant-Appellant-Respondent,

URS Corporation,
Defendant.

- - - - -

J.D. Posillico, Inc.,
Third-Party Plaintiff-Respondent,

-against-

Carabie Corp.,
Third-Party Defendant-Appellant.

- - - -

1732
1733- Jonas Macedo,
Plaintiff-Appellant,

-against-

J.D. Posillico, Inc.,
Defendant-Respondent,

URS Corporation,
Defendant.

- - - -

J.D. Posillico, Inc.,
Third-Party Plaintiff-Respondent,

-against-

Carabie Corp.,
Third-Party Defendant-Respondent.

Traub Lieberman Straus & Shrewsberry, LLP, Hawthorne (Sheryl A. Bruzzese of counsel), for J.D. Posillico, Inc., appellant-respondent/respondent.

Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for Carabie Corp., appellant-appellant.

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for Jonas Macedo, respondent/appellant.

Order, Supreme Court, New York County (Carol Edmead, J.), entered December 1, 2008, which, insofar as appealed from, as limited by the briefs, granted plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim, denied defendant Posillico's cross motion for summary judgment dismissing certain portions of plaintiff's Labor Law § 241(6) claim, and granted Posillico's motion for summary judgment on its contractual indemnification claim, unanimously modified, on the law, to grant Posillico's cross motion to the extent of dismissing plaintiff's Labor Law § 241(6) claim premised on Industrial Code (12 NYCRR) § 23-1.15(c) and § 23-5.1(c), and otherwise affirmed, without costs. Order, same court and Justice, entered August 14, 2008, which granted Carabie's motion for partial summary judgment dismissing plaintiff's claim for lost wages, unanimously reversed, on the law, without costs, the motion denied and the claim reinstated. Appeal from order, same court and Justice, entered June 26, 2009, denying reargument and renewal of the August 14, 2008 order, unanimously dismissed, without costs, as taken from a non-appealable order and as

academic, respectively.

Plaintiff met his prima facie burden of establishing that he was performing work covered by section 240(1). It is undisputed that he was working on an elevated platform, attempting to lift a cone hanging from a rope, when he and a co-worker fell from the platform (*see Landgraff v 1579 Bronx Riv. Ave., LLC*, 18 AD3d 385 [2005]; *Kyle v City of New York*, 268 AD2d 192 [2000], *lv denied* 97 NY2d 608 [2002]). Whether or not the platform failed or bent prior to plaintiff's fall is irrelevant because there is no question that neither plaintiff's safety device nor the platform and associated safety wire prevented his fall and subsequent injury.

Even were we to consider that plaintiff's right to recover under § 240(1) requires that plaintiff prove that the platform failed, we note that no witness rebuts plaintiff's contention, supported by the testimony of his co-workers, that the platform bent or failed. Defendant Posillico merely offered testimony from persons who did not witness the accident that after the accident "no changes or repairs were made to the platform," and that the platform was "secure" after the accident. This simply does not refute the eyewitness testimony that the platform bent at the time of the accident.

The motion court properly refused to dismiss plaintiff's

Labor Law § 241(6) claim premised on Industrial Code (12 NYCRR) § 23-1.15. Indeed, § 23-5.1(j) specifically requires safety railings for *all* scaffold platforms. Similarly, § 23-5.3(e) requires safety railings for all metal scaffolds. While § 23-5.8, which covers suspended scaffolds, does not mention safety railings, there is no indication that the rules provided in § 23-5.1 and § 5.3 are not applicable to suspended scaffolds.

However, the motion court erred in refusing to dismiss plaintiff's Labor Law § 241(6) claim premised on Industrial Code (12 NYCRR) § 23-1.15(c). Indeed, § 23-1.15(c) does not require the presence of a toe board when "such safety railing is installed at grade or ground level or is not adjacent to any opening, pit or other area which may be occupied by any person." Since there were no workers below the platform in this case, the claim based on 23-1.15(c) should have been dismissed.

The motion court properly refused to dismiss plaintiff's § 241(6) claim premised on Industrial Code (12 NYCRR) § 23-1.16(d), which requires that tail lines shall not be longer than four feet. Here, plaintiff testified that his line was approximately six feet long and that if he had not fallen that far he would not have experienced the jolt that caused his injury.

Finally, as this Court has previously held, the § 241(6) claim premised on Industrial Code (12 NYCRR) § 23-5.1(c)(1) must

fail because the provision is insufficiently specific (*Greaves v Obayashi Corp.* 55 AD3d 409, 410 [2008], *lv dismissed* 12 NY3d 794 [2009]).

The motion court properly granted Posillico summary judgment on its contractual indemnification claim. It was undisputed that Carabie directed and controlled plaintiff's work as well as the construction and installation of the platform. Further, the Labor Law § 200 and commom law negligence claims against Posillico were dismissed. Thus, while Carabie's negligence has not yet been proven, Posillico's liability, if any, would only be vicarious and statutory. Accordingly, Posillico is entitled to enforce the indemnification provision in its agreement with Carabie (*see Colozzo v National Ctr. Found., Inc.*, 30 AD3d 251 [2006]; *Aarons v 401 Hotel, L.P.*, 12 AD3d 293 [2004].

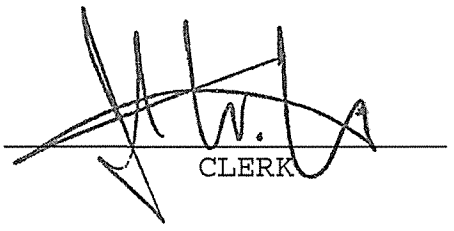
Plaintiff did not forfeit his right to recover lost wages since the evidence did not show that Carabie was induced to hire him because he produced false documentation (*see Balbuena v IDR Realty LLC*, 6 NY3d 338, 362-363 [2006]; *Coque v Wildflower Estates Devs., Inc.*, 58 AD3d 44, 52 [2008]). While plaintiff admitted that he had a false social security number which he obtained in 1995, he maintained that at the time Carabie hired him, he only provided a driver's license, union card and tax ID card. Carabie's Chief Operating Officer claimed that plaintiff

provided a copy of his social security card at the time he was hired, which Carabie relied on as being accurate, and she provided a copy of plaintiff's social security card which Carabie apparently obtained at some point. However, it is undisputed that Carabie did not complete or have plaintiff sign an I-9 Form until months after the accident took place. Accordingly, even assuming that plaintiff had submitted his social security card at the time of his hire, it is clear that Carabie failed to comply with its employment verification obligations in good faith. Thus, it cannot be concluded that plaintiff induced Carabie to hire him based on his social security card.

We have considered the parties' remaining arguments and find them unavailing.

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

ENTERED: DECEMBER 10, 2009



Mazzarelli, J.P., Andrias, Saxe, Catterson, Acosta, JJ.

1735 The People of the State of New York, Respondent, Ind. 58531C/05

-against-

Earl Cook, Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Rafael Curbelo of counsel), for respondent.

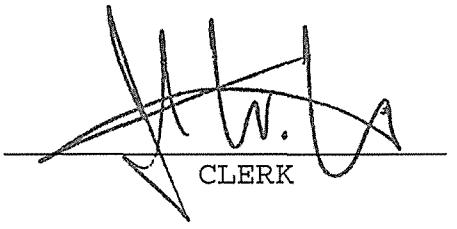
Judgment, Supreme Court, Bronx County (David Stadtmauer, J.), rendered April 7, 2008, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

The court properly denied defendant's application made pursuant to *Batson v Kentucky* (476 US 79 [1986]). Defendant did not produce "evidence sufficient to permit the trial judge to draw an inference that discrimination ha[d] occurred" (*Johnson v California*, 545 US 162, 170 [2005]), and thus failed to make a prima facie showing of gender discrimination in the People's exercise of their peremptory challenges. Defendant does not allege that the People excluded a disproportionate number of men from the panel, but instead alleges a disparity between the rate at which the People challenged male panelists and the percentage

of men in the available panel (*see Jones v West*, 555 F3d 90, 98 [2d Cir 2009]). However, we conclude that, given the number of panelists involved, the rate of challenges to men was not so "significantly higher than the [male] percentage of the venire" as to "support a statistical inference of discrimination" (*United States v Alvarado*, 923 F2d 253, 255 [2d Cir 1991}; *cf. Castaneda v Partida*, 430 US 482, 496 n 17 [1977]). The record does not support defendant's additional argument that characteristics of the challenged panelists also give rise to an inference of discrimination.

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

ENTERED: DECEMBER 10, 2009



Mazzarelli, J.P., Andrias, Saxe, Catterson, Acosta, JJ.

1736 Gladys Perez, Index 16985/04
Plaintiff-Appellant,

-against-

Andrews Plaza Housing Associates, L.P., et al.,
Defendants-Respondents.

Law Offices of Samuel J. Lurie, New York (Dennis A. Breen of counsel), for appellant.

Curan, Ahlers, Fiden & Norris, LLP, New York (Joan L. Fiden of counsel), for respondents.

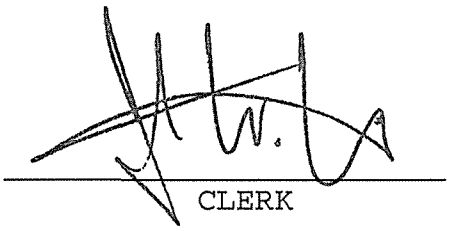
Judgment, Supreme Court, Bronx County (Alan J. Saks, J.), entered September 4, 2008, upon a jury verdict in favor of defendants, dismissing the complaint, unanimously affirmed, without costs.

The jury's verdict was supported by valid lines of reasoning and permissible inferences from the evidence at trial (*see Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]), and was not against the weight of the evidence. Notwithstanding that defendants presented no direct evidence to contradict it, the jury was free to disbelieve plaintiff's testimony that she gave defendants notice of the defective door saddle that caused her to slip and fall (*see* PJI 1:37; *Matter of Nowakowski*, 2 NY2d 618, 622 [1957]). The jury could rationally have found plaintiff's

testimony unbelievable in light of her admission that she never went to defendants' management office to complain in person during the three months in which she claimed her telephoned complaints were being ignored and defendants' evidence that they had responded to other, unrelated, complaints that plaintiff made in the same time period.

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

ENTERED: DECEMBER 10, 2009



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Mazzarelli, J.P., Andrias, Saxe, Catterson, Acosta, JJ.

1737 Sutton Madison, Inc., Index 107183/08
Plaintiff-Appellant,

-against-

27 East 65th Street Owners Corp.,
Defendant-Respondent.

Lewette Fielding, PC, New York (Lewette Fielding of counsel), for appellant.

Schechter & Brucker, P.C., New York (Kenneth H. Amorello of counsel), for respondent.

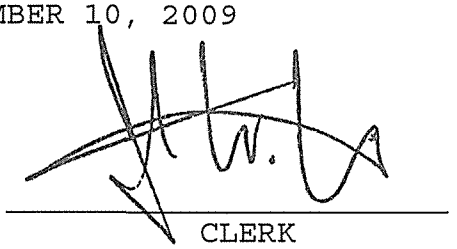
Order, Supreme Court, New York County (Marilyn Shafer, J.), entered September 10, 2008, which granted defendant's motion to dismiss the complaint, unanimously affirmed, with costs.

Plaintiff's attempt to amend its complaint without leave of court failed to comply with CPLR 3025(a) and in any event was without merit. Defendant agreed to allow access for adjustments to the HVAC unit and added plaintiff and the ground lessor as additional named insureds on its insurance policies. Thus, the declaratory relief plaintiff sought "[would] become effective only upon the occurrence of a future event that may or may not come to pass" (*Matter of Gates v Hernandez*, 26 AD3d 288, 289 [2006]). Plaintiff's argument that continuing disputes are not hypothetical is without support in the record. In any event,

plaintiff has the adequate alternate remedy of an action for breach of contract (*see Apple Records v Capitol Records*, 137 AD2d 50, 54 [1988]).

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

ENTERED: DECEMBER 10, 2009



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Mazzarelli, J.P., Andrias, Saxe, Catterson Acosta, JJ.

1738 Marva Boothe, Index 23462/01
Plaintiff-Respondent-Appellant,

-against-

Manhattan and Bronx Surface Transit Operating Authority, et al.,
Defendants-Appellants-Respondents,

Luis Velasquez, et al.,
Defendants.

Gruvman, Giordano & Glaws, LLP, New York (Charles T. Glaws of counsel), for appellants-respondents.

Law Offices of Edmond J. Pryor, Bronx (Edmond J. Pryor of counsel), for respondent-appellant.

Judgment, Supreme Court, Bronx County (Yvonne Gonzalez, J., and a jury), entered on or about September 18, 2008, in an action for personal injuries sustained in a collision between a public bus and a cab in which plaintiff was a passenger, in favor of plaintiff and against defendants, and bringing up for review an order denying the MBSTOA defendants' motion to set aside the verdict, unanimously reversed, on the law, without costs, the motion granted, and the matter remanded for a new trial on the question of liability, and the damage award reinstated.

In the course of deliberations, the jury advised the trial court that it had finished its deliberations and reached a verdict. In fact, it had failed to respond to two of the special

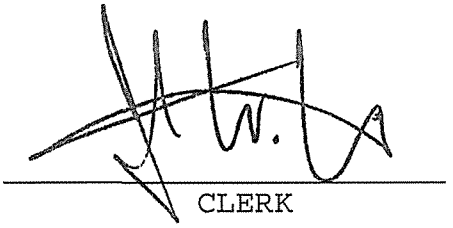
interrogatories in support of a general verdict; one concerning whether the bus driver's negligence was a substantial factor in causing the accident, and the other apportioning fault among defendants. Without fully informing counsel of the specific omissions and without making a record, the court directed the jury to complete the verdict sheet. The jury then returned a verdict against both sets of defendants, apportioning fault 40% against the MBSTOA defendants, who appeal. Although not mandated by statute in civil proceedings, the rationale for the requirement in criminal proceedings that counsel be given an opportunity to be heard when the jury requests additional information or instruction (*see People v O'Rama*, 78 NY2d 270, 276-277 [1991] [such opportunity is essential to counsel's ability to represent client's best interests and protect client's constitutional and statutory rights at critical postsubmission proceedings that may well be determinative of the outcome]) is no less applicable to civil proceedings where there is indication of jury confusion (*see Cortes v Edoo*, 228 AD2d 463, 466 [1996]). Here, although the jury did not specifically request additional information or instruction, it returned a verdict which disregarded clear instructions on the verdict sheet. By failing to provide counsel with an opportunity to be heard, the court may have inadvertently influenced the verdict. Counsel should have

been afforded the opportunity to request that the court adopt a different course, such as making further inquiry of the jury or repeating the court's charge on substantial factor. Since there is no transcript of the court's comments to the jury, it cannot be determined whether such comments may have influenced the verdict.

Finally, we find no grounds to reduce the jury award on damages and reinstate that verdict subject to the new trial on liability.

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

ENTERED: DECEMBER 10, 2009



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Mazzarelli, J.P., Andrias, Saxe, Catterson, Acosta, JJ.

1740 The People of the State of New York, Respondent, Ind. 1734/03

-against-

Edward Thomas, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Timothy C. Stone of counsel), for respondent.

Judgment of resentence, Supreme Court, New York County (Carol Berkman, J.), rendered October 14, 2008, resentencing defendant, as a second felony offender, to concurrent terms of 3 years and 1½ to 3 years, with 5 years' postrelease supervision, unanimously affirmed.

The court properly resentenced defendant to comply with the requirement that a term of postrelease supervision be part of the court's oral pronouncement of sentence (*see People v Sparber*, 10 NY3d 457 [2008]). The resentencing was not untimely under Correction Law § 601-d(4)(d), because defendant's attorney consented to adjournments of the proceedings so that defendant could be produced. We reject defendant's argument that by providing that "[t]he designated person may, with counsel, knowingly consent to extend the time periods specified in

paragraphs (c) and (d) of this subdivision," Correction Law § 601-d(4)(e) requires a defendant's personal consent. There is nothing in that language, or elsewhere, to suggest that the Legislature intended to add to the very narrow category of fundamental decisions to be made by a defendant personally (*see People v Ferguson*, 67 NY2d 383, 390 [1986]). In particular, "[s]cheduling matters are plainly among those for which agreement by counsel generally controls" (*New York v Hill*, 528 US 110, 115 [2000]).

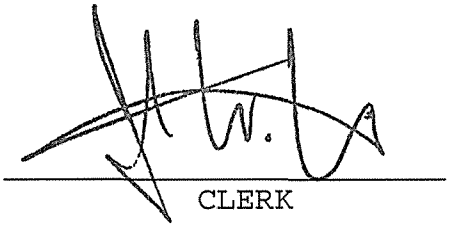
In any event, we also conclude that when a resentencing does not comply with the time limits set forth in Correction Law § 601-d(4)(c) or (d), this does not entitle a defendant to have PRS removed from the sentence. These time limits do not affect a court's inherent power to correct its error in sentencing (*see* Correction Law § 601-d[8]; *People v Pelsey*, 2009 WL 3066662, *3, 2009 NY Misc LEXIS 2648, *3 [Sup Ct, Queens County 2009]; *see also People v Sparber*, 10 NY3d at 471-472).

Defendant failed to preserve his claims that the court lacked authority and jurisdiction to correct his sentence and that double jeopardy and due process protections rendered his resentencing unconstitutional, and we decline to review them in the interest of justice (*see People v Rodriguez*, 60 AD3d 452 [2009], *lv granted* 12 NY3d 928 [2009]). As an alternative

holding, we find them without merit (*see People v Hernandez*, 59 AD3d 180 [2009], *lv granted* 12 NY3d 817 [2009]).

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

ENTERED: DECEMBER 10, 2009



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Mazzarelli, J.P., Andrias, Saxe, Catterson, Acosta, JJ.

1741 The People of the State of New York, Ind. 2508/05
Respondent,

-against-

Zimecca Henry,
Defendant-Appellant.

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

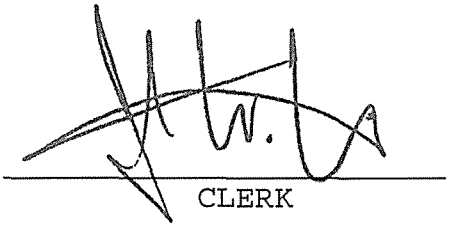
Robert M. Morgenthau, District Attorney, New York (Britta Gilmore of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Renee A. White, J.), rendered on or about November 8, 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.

ENTERED: DECEMBER 10, 2009



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

Mazzarelli, J.P., Andrias, Saxe, Catterson, Acosta, JJ.

1743 Donnell Holliman, Index 103820/07
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

Cullen & Dykman LLP, Brooklyn (Joseph Miller of counsel), for appellant.

Langsam Law, LLP, New York (Kenneth J. Gorman of counsel), for respondent.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered on or about January 29, 2009, which denied defendant's motion for summary judgment dismissing the complaint and granted plaintiff's cross motion for leave to amend the notice of claim, unanimously reversed, on the law, without costs, and the motion for summary judgment granted. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

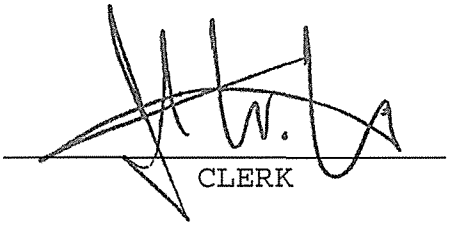
Plaintiff was injured in an attempt to extinguish a fire that broke out on the stove in her kitchen after she had been cooking. She became alerted to the fire by a burning, smoky odor, rather than by the smoke alarm defendant had installed in the apartment, which apparently was not activated by the fire. After plaintiff tried twice to extinguish the fire, she and all the other occupants evacuated the apartment and reached an area

of safety physically unharmed. However, plaintiff re-entered the apartment to try a third time to extinguish the still burning fire, and it was then that she was injured.

Defendant established that, despite the purported failure of the properly installed smoke detector (*see* Administrative Code of City of NY § 27-2045[a][1]) to alert plaintiff to the fire, plaintiff and her family exited the apartment without injury, and that the sole proximate cause of plaintiff's injuries was her re-entering the apartment and attempting again to extinguish the fire when, by her own admission, she had no means of doing so (*see e.g. Egan v A.J. Constr. Corp.*, 94 NY2d 839 [1999]; *Pinto v Selinger Ice Cream Corp.*, 47 AD3d 496 [2008]). Given plaintiff's conduct, we need not consider plaintiff's amendment of her notice of claim.

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

ENTERED: DECEMBER 10, 2009



Mazzarelli, J.P., Andrias, Saxe, Catterson, Acosta, JJ.

1744N Wolfson Septimus, Index 106298/08
Plaintiff-Respondent,

-against-

Dr. Jorge Matos, et al.,
Defendants,

Dr. Mark Bronsky,
Defendant-Appellant.

Landman Corsi Ballaine & Ford P.C., New York (Cristi Luckow of counsel), for appellant.

Joel M. Kotick, New York, for respondent.

Order, Supreme Court, New York County (Joan B. Lobis, J.), entered October 17, 2008, which, in an action for dental malpractice, denied defendant's motion to compel plaintiff to participate in an "alternative dispute resolution process" of the New York State Dental Association, unanimously affirmed, with costs.

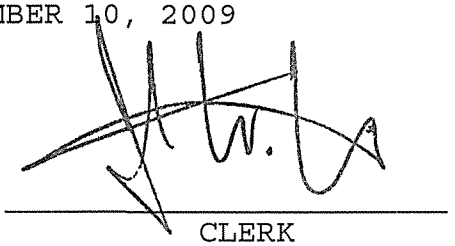
The subject Peer Review Agreement containing the subject alternative dispute resolution clause invoked by defendant states that the parties were waiving their respective rights to sue "on the facts or issues *submitted* to the Peer Review Committee"; the Guide to Peer Review, which, as described by the Agreement, more fully explains the Peer Review process and was received and read by the parties before signing the Agreement, states that the

parties were waiving the right to sue "on the facts or issues *decided* by the Peer Review Committee" (emphasis added). Aside from the ambiguities created by this difference in language, it does not appear that any disputes were "submitted" to the Committee simply by virtue of the parties' execution of the Agreement and submission of accompanying Statements and, in defendant's case, his treatment records. The Guide provides that once the dentist returned the Agreement along with copies of relevant treatment records, the Committee chairperson would determine whether "Peer Review can resolve the complaint." No such determination was made here because, under the Guide, a patient complaint was not eligible for Peer Review unless the patient placed the balance owed to the dentist for the treatment in escrow pending the outcome of the Peer Review, and plaintiff here withdrew from that process without having made such deposit. The Association, apparently, does not consider itself competent to decide disputes when a patient refuses to comply with the escrow requirement; its letter to defendant advising of plaintiff's "withdraw[al] from Peer Review prior to mediation" stated that no findings would be made and that the "dispute is now closed from further consideration." As the motion court correctly concluded, plaintiff cannot be compelled to proceed before a forum that has deemed his complaint withdrawn and will

not entertain it (*cf. Strattner v Cabrini Med. Ctr.*, 257 AD2d 549 [1999] [by serving a demand for arbitration, plaintiff initiated a process that resulted in an arbitration award in favor of defendant on the very claims that plaintiff seeks to litigate, with plaintiff's full participation in that process, and noting that "at no time did plaintiff seek to withdraw his demand for arbitration"]).

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

ENTERED: DECEMBER 10, 2009



CLERK

Mazzarelli, J.P., Andrias, Saxe, Catterson, Acosta, JJ.

1745N Anwar Barrett-Bell, etc., et al., Index 15122/05
Plaintiffs-Respondents,

-against-

Iris Cab Corp., et al.,
Defendants,

Julio Cesar Mendoza, et al.,
Defendants-Appellants.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for appellants.

The Adam Law Office, P.C., New York (Peter Diawuo-Amankonah of counsel), for respondents.

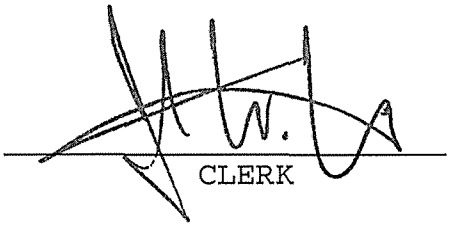
Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered January 8, 2009, which denied defendants-appellants' motion to compel plaintiff to appear for an orthopedic examination, unanimously affirmed, without costs.

In support of the motion, defendants' attorney represented that plaintiff Stanley Bell willfully failed to submit to an orthopedic examination that defendants first scheduled for June 24, 2008 and then for July 15 and August 5, 2008, in violation of court orders dated September 25, 2007 and March 19, 2008. In opposition, plaintiff's attorney represented that on April 7, 2008, he received a notice from defendants' attorney, dated March 31, 2008, unilaterally scheduling two physical examinations for

April 8 at the same address, one by an orthopedist and the other by a neurologist, and that notwithstanding the short notice, plaintiff appeared on April 8 at the offices of the doctors designated in the notice and was examined by them. In reply, defendants' attorney represented that while plaintiff appeared for the medical examinations scheduled for April 8, he was examined not by the orthopedist designated in defendants' notice but by a chiropractor with the same last name as the orthopedist. The motion court denied defendants' motion on the ground that it was "disingenuous" in conveying that the examination was not conducted because of plaintiff's failure to respond to defendants' examination notices "when in reality it was defendants' error in [failing to] ensur[e] that the proper physician conducted the physical examination." This was a proper exercise of discretion. The prejudice claimed by defendants is mitigated by the chiropractor's report, which indicates normal ranges of motion.

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

ENTERED: DECEMBER 10, 2009



SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
David B. Saxe
James M. McGuire
Rolando T. Acosta
Nelson S. Roman, JJ.

1470
Index 102920/06

Tracy Altman Warner, et al.,
Plaintiffs-Appellants,

-against-

Kenneth R. Kaplan, et al.,
Defendants-Respondents,

Rosenbluth & Rosenbluth, etc.,
Defendant.

Plaintiffs appeal from an order of the Supreme Court, New York County (Barbara R. Kapnick, J.), entered November 6, 2008, which granted defendants' motion for summary judgment dismissing the complaint.

Richard A. Kraslow, P.C., Melville (Richard A. Kraslow of counsel), for appellants.

Victor & Bernstein, P.C., New York (Donald M. Bernstein of counsel), for respondents.

SAXE, J.

This appeal concerns which party is entitled to the contract deposit placed in escrow pursuant to a contract of sale for a co-op apartment, when the purchaser dies after the sale is approved by the co-op's board of directors but before closing.

On May 11, 2005, defendants Kenneth F. Kaplan and Diane F. Kaplan, as sellers, and Glen Altman, as purchaser, entered into a contract for the sale of cooperative apartment 2A at 1150 Park Avenue in Manhattan, for the purchase price of $2.3 million in cash; a deposit of $230,000 was placed in escrow. As required by the contract, on July 27, 2005, Altman submitted her application to the co-op's board of directors for approval of the sale. On August 11, 2005, she was interviewed by the board of directors, and the board approved the sale on August 18, 2005.

While plaintiffs assert that Altman did not receive notification of the board's approval before she died, a broker for the co-op's managing agent stated that she informed Altman of the approval, and that on August 22, 2005, at Altman's request, Altman and her stepdaughter went to the subject apartment to consider whether Altman should purchase any of the sellers' personal property. On September 1, 2005, Altman died after suffering a stroke.

In a letter dated September 28, 2005, plaintiffs Tracy

Altman Warner and Alan G. Kraut, co-executors of Glen Altman's estate, demanded that the sellers return the contract deposit of $230,000; the sellers took the position that the contract remained binding upon Altman's heirs, and if Altman's estate refused to close, it would be in default.

This action for return of the contract deposit followed, and, at the close of discovery, defendants moved for summary judgment dismissing the complaint. The motion was granted. We affirm that determination.

The crux of this matter lies in contract paragraph 15.2, which expressly makes the contract binding on the parties' "heirs, personal and legal representatives and successors in interest." The inclusion of this provision indicates that the parties explicitly contemplated, and provided for, the possibility of either party's death before closing, by specifying that the death would not terminate the contract, but that the contract would survive, to be performed by the successors or heirs of the deceased party. This provision makes the contract binding on Altman's estate.

While a contract for personal services is terminated by the death of the servant (*see Minevitch v Puleo*, 9 AD2d 285, 287 [1959]), a contract of sale is not terminated by the death of the purchaser. On the contrary, as a general rule,

> "[w]here the proposed purchaser dies before the closing of title, his executor or administrator may pay the balance of the purchase price and take the deed in his own name holding it in trust for the heirs at law or devisees. It is the duty of the fiduciary for a deceased vendee to complete payments under a contract entered into by such vendee for the purchase of real property" (4-35 Warren's Weed New York Real Property § 35.24 [2009] [footnote omitted]; *see Di Scipio v Sullivan*, 30 AD3d 660 [2006]).

We reject plaintiffs' suggestion that paragraph 1.17, the "Proposed Occupants" provision of the form contract, which was left blank in this instance, somehow negates paragraph 15.2. The purpose of the provision is merely to allow the purchaser to indicate which, if any, other individuals will be residing in the apartment with her. Whether filled in or left blank, the provision does not invalidate or limit the provision binding the parties' heirs to their predecessors' contractual obligations. Even if Altman had listed proposed occupants, upon her death, the legal issues presented would remain the same, and their resolution would still depend on whether her heirs were contractually obligated to purchase the apartment, regardless of whether the Board had approved the proposed occupants.

Indeed, paragraph 15.2 would be meaningless if it did not bind the purchaser's estate to her contractual obligation to purchase the apartment, and "a contract should not be interpreted

so as to render any clause meaningless" (*RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272, 274 [2007]). That the provision is a standard clause in a form contract renders it no less enforceable; the clause is clear and unambiguous, and if it inaccurately reflected the parties' intentions, it could have been rewritten (*see Slamow v Del Col*, 79 NY2d 1016, 1018 [1992]).

We also reject plaintiffs' contention that Altman's death before closing justifies nonperformance under the defense of either impossibility or frustration of contract.

"Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract" (*Kel Kim Corp. v Central Mkts.*, 70 NY2d 900, 902 [1987]). Paragraph 15.2 of the contract conclusively disproves the theory's applicability here. Plaintiffs rely on a case in which the very subject matter of the contract was destroyed, making performance impossible (*see Stewart v Stone*, 127 NY 500 [1891]). However, where performance is possible, albeit unprofitable, the legal excuse of impossibility is not available (*see 407 E. 61st Garage v Savoy Fifth Ave. Corp.*, 23 NY2d 275, 282 [1968]). The other cases plaintiffs rely on for application of the

impossibility defense are also not on point.

Similarly, although at first blush the general definition of "frustration of contract purpose" would seem to suit these circumstances, closer examination reveals that the defense cannot be applied here. "In order to invoke the doctrine of frustration of purpose, the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense" (22A NY Jur 2d, Contracts § 375). Since it is agreed that Altman was purchasing the apartment solely for her own residence, her death would, by this definition, frustrate the purpose of the contract. However, "the doctrine of frustration of purpose . . . is not available where the event which prevented performance was foreseeable and provision could have been made for its occurrence" (*Matter of Rebell v Trask*, 220 AD2d 594, 598 [1995], citing *407 E. 61st Garage*, 23 NY2d at 282). Since the contract actually made explicit provision for the event of either party's death, the doctrine is not available here.

Plaintiffs challenge the contract on the additional ground that the contract contingency was not satisfied because Altman did not receive notification of approval before she died. However, plaintiffs have no grounds on which to deny the Board's issuance of written approval, and they fail to offer specific

facts contradicting the broker's affidavit stating that Altman was informed and, in fact, thereafter took her stepdaughter to the apartment with her to consider whether to purchase any of the personal property in it. The bare assertion that Altman did not receive the notice of approval, without specific facts in support, is insufficient to avoid the estate's contractual obligations.

Plaintiffs also contend that Altman had already satisfied the contract's requirement that the purchaser submit an application for the board's approval of the sale, and since there is no provision in the contract that imposes on the purchaser's estate or heirs an affirmative obligation to submit a further application for the board's approval, their failure to do so cannot be treated as a repudiation of the contract. The question therefore becomes whether paragraph 6, or any other contract provision, imposed any further obligation regarding board approval, either on Altman's estate or on the sellers, following Altman's death.

Paragraph 6.1 declares that "[t]his sale is subject to the approval of the Corporation," and paragraph R25 of the Supplemental Rider to the contract makes the contract contingent on the board's approval of the transaction. Notwithstanding Altman's compliance with contract subparagraph 6.2.1, which

specifies the steps required of the purchaser to apply for the board's approval, once Altman's death made the contract of sale binding on her estate, the board's initial approval of Altman as buyer and as occupant no longer sufficed to satisfy paragraphs 6.1 and R25. The board had not authorized either the sale to Altman's estate or residency in the unit by an occupant selected by the estate. So, since the estate was bound by the obligation to purchase the apartment, the estate had to obtain the board's approval.

Once it is accepted that the contract remained binding following Altman's death, and that the board's approval was required to be obtained anew, it necessarily follows that Altman's estate was required to take the steps necessary to obtain the board's approval. This is so because only the purchaser has the information needed by the board to determine whether a purchase should be approved. Plaintiffs may not rely on an asserted belief, based on general knowledge, that the board would not have approved the estate as purchaser. In fact, the evidence establishes that the cooperative did not have a policy in place that would have precluded a transfer to the estate. Nor is it relevant that the board declined to provide advance assurances of approval in response to the sellers' informal inquiry. Unless and until a purchaser provides the board with

the necessary application for approval of a transaction, the board has neither the obligation nor the ability to determine whether the proposed sale should be approved. Indeed, because plaintiffs failed to seek board approval of the sale to the estate, we need not rule on the estate's right to reimbursement of the contract deposit in the event the board disapproved the sale.

The estate's failure to pursue any application to the board, along with its declaration that it would not perform under the contract of sale and its letter demanding the return of the contract deposit of $230,000 from the sellers -- in the face of the sellers' demand that the estate proceed to closing -- together establish a repudiation of the contract by the estate, entitling the sellers under the clear terms of the contract to the liquidated damages of the contract deposit (*see Norcon Power Partners v Niagara Mohawk Power Corp.*, 92 NY2d 458, 462-463 [1998]; *Stadtmauer v Brel Assoc. IV*, 270 AD2d 59, 60 [2000]).

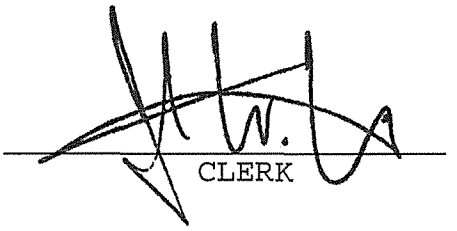
Accordingly, the order of the Supreme Court, New York County (Barbara R. Kapnick, J.), entered November 6, 2008, which granted defendants' motion for summary judgment dismissing the complaint,

should be affirmed, without costs.

All concur.

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

ENTERED: DECEMBER 10, 2009



DEC 10 2009

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Richard T. Andrias
Karla Moskowitz
Dianne T. Renwick
Rosalyn T. Richter, JJ.

1298-1299
Index 105755/05

x

James Acevedo, et al.,
Plaintiffs,

Steve Rosenthal,
Plaintiff-Respondent,

-against-

The Piano Building LLC, etc.,
Defendant-Appellant,

JEM Realty Associates LLC, etc.,
Defendant.

x

Defendant The Piano Building LLC appeals from an order and judgment (one paper) of the Supreme Court, New York County (Marcy S. Friedman, J.), entered June 19, 2008, which, inter alia, granted plaintiff Rosenthal's motion for summary judgment and declared his unit

subject to rent stabilization pursuant to the Emergency Tenant Protection Act of 1974.

Heiberger & Associates, P.C., New York (Maxwell Breed and Lawrence C. McCourt of counsel), for appellant.

Himmelstein McConnell Gribben Donoghue & Joseph, New York (David E. Frazer of counsel), for respondent.

RENWICK, J.

In this landlord-tenant dispute, we revisit the issue of whether an apartment covered by the Loft Law may revert to rent stabilization after the landlord purchased the prior occupant's rights under Multiple Dwelling Law (MDL) § 286(12) in a pre-1974 building containing six or more residential units. The landlord invites us to overrule our 2002 pronouncement in *182 Fifth Ave. v Design Dev. Concepts* (300 AD2d 198) in which we answered the question in the affirmative. The owner relies primarily upon *Wolinsky v Kee Yip Realty Corp.* (2 NY3d 487 [2004]), which the Second Department has interpreted broadly as barring Emergency Tenant Protection Act of 1974 (ETPA)[1] coverage to all loft units not subject to the Loft Law, even where the Zoning Resolution permits residential use as of right. We decline to follow the Second Department, as we find *Wolinsky* consistent with our view on this issue.

The essential facts are undisputed. The unit that is the subject of this action is a loft apartment (#14C) at 115 West 23rd Street in Manhattan. When the former owner purchased the

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[1] ETPA provides for the regulation of all housing accommodations it does not expressly except, including previously unregulated accommodations (McKinney's Uncons. Laws of NY §§ 8623, 8625). Buildings containing fewer than six units are expressly excepted (§ 8625[a][4][a]).

commercial building in December 1977, Keith Christensen held a residential lease for the unit. In 1985, the Loft Board ruled that seven of the building's units, including Christensen's apartment, constituted an Interim Multiple Dwelling (IMD) and that his unit was covered under the Loft Law (MDL art 7-C).[2] The apartment thus became subject to rent regulation.

In December 1995, the former owner purchased the tenant's rights under the Loft Law pursuant to MDL § 286(12). The Loft Board sales record form indicates that the unit would not be converted to nonresidential use. In the space asking whether the unit is "subject to rent regulation under any other law, rule or regulation," the response is that it was an IMD and "is now registered with DHCR." The buyout agreement states that the Christensens, as occupants of the unit vacated, "were and are covered under article 7C of the Multiple Dwelling Law or the Rent Stabilization Laws."[3] By the time of this transaction, the prior owner had already obtained a certificate of occupancy for

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[2] The Loft Law permits conversion of IMDs, which are defined as any building once used for commercial, manufacturing, or warehouse purposes and that lack a residential certificate of occupancy (MDL § 281[1]). The Loft Law is generally limited to buildings that, on December 1, 1981, had been occupied for residential purposes by three or more families living independently of each other since April 1, 1980 (*id*).

[3] At the time, Christensen apparently was married.

residential use of the premises. In addition, the certificate of occupancy indicates that the building contains 18 residential units. The owner kept the unit as a residential rental.

In June 1999, plaintiff Rosenthal began to occupy Unit 14C pursuant to a residential lease. From its inception, the prior owner treated Rosenthal as an unregulated market rent tenant, with monthly rent starting at $2,781.[4] In April 2005, Rosenthal and others[5] commenced this action to declare his unit subject to rent stabilization under ETPA and to recover rent overcharges. The owner asserted in its answer that since the prior owner had purchased the Loft Law rights from the tenant's predecessor, the unit is not subject to ETPA. Where there is a sale of rights pursuant to the Loft Law, the owner argued, the unit is permanently deregulated. On the other hand, the tenant maintained that residential use of the unit triggered rent stabilization protection under ETPA for pre-1974 buildings with more than six residential units.

Following discovery, the tenant and the landlord each moved for summary judgment on the foregoing defense. The court granted

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[4] The most recent monthly rent charged by the landlord was $3,201.14.

[5] Numerous other similarly situated residential tenants were part of this litigation but settled their respective claims against the owner during different stages of this action.

the tenant's motion and denied the owner's cross motion, relying primarily upon our decision *in 182 Fifth Ave. v Design Dev. Concepts*. The owner now appeals.

We reject the owner's assertion that the sale of the Loft Law rights here ended the unit's eligibility for rent stabilization. In *182 Fifth Ave.*, this Court confronted a circumstance identical to this one: the owner of a loft covered by the Loft Law purchased the protected occupant's rights under MDL § 286(12) and then leased the unit for residential purposes. We held that where, as here, the building contains six or more residential units, it is subject to rent stabilization by virtue of ETPA "notwithstanding the sale of Loft Law rights by a prior tenant" (300 AD2d at 199; *see also Matter of 315 Berry St. Corp. v Hanson Fine Arts*, 39 AD3d 656 [2007], *lv dismissed* 10 NY3d 742 [2008]).

The result in *182 Fifth Ave.* and its progeny is amply supported by the plain language of MDL § 286(12), which reads as follows:

> No waiver of rights pursuant to this article by a residential occupant qualified for protection pursuant to this article made prior to the effective date of the act which added this article shall be accorded any force or effect; however, subsequent to the effective date an owner and a residential occupant may agree to the purchase by the owner of *such person's rights in a unit* (emphasis added).

By its own terms, MDL § 286(12) applies only to the purchase of an occupant's Loft Law rights. The statute says nothing about rent stabilization or ETPA; it says nothing about any subsequent tenant's rights; indeed, it says nothing about deregulating units in any way whatsoever. The purchase of rights permitted in this section is thus necessarily limited to an occupant's rights under the Loft Law.

This conclusion is bolstered by the Loft Board's own regulations, which contemplate that units formerly covered by the Loft Law may be subject to rent stabilization even after they have been "deregulated" under the Loft Law. These regulations provide that an owner has two options after a sale of rights under MDL § 286(12). First, the owner may return the unit to its lawful commercial use, in which event the owner must file a certificate with the Loft Board and submit to a Loft Board inspection to confirm that all residential fixtures have been removed (29 RCNY § 2-10[c][1]). The owner here does not claim to have availed itself of this option. Indeed, it issued the tenant a residential lease.

Under the regulation, the second option offered by the Loft Law upon a sale pursuant to MDL § 286(12) is to continue residential use, except that the owner must legalize the unit

under the Loft Law and it may remain subject to rent regulation (29 RCNY § 2-10[c][2]):

> *Residential use.* If the unit is to remain residential, the owner remains subject to all the requirements of Article 7-C, and regulations and orders of the Board, including the legalization requirements of Multiple Dwelling Law § 284, except that the unit is no longer subject to rent regulation where coverage under Article 7-C was the sole basis for such rent regulation, provided that there is no finding by the Loft Board of harassment as to any occupant(s) of the unit which has not been terminated pursuant to § 2-02(d)(2) of the Board's Harassment Regulations. During the period of its IMD status, the IMD unit may be converted to non-residential use, as set forth in § 2-10(c)(1) of these regulations, except that a harassment finding made after a sale shall not bar conversion of the unit to non-residential use.

The only other "such rent regulation" is ETPA. The Loft Board thus acknowledges that a former Loft Law unit may be covered by rent stabilization. If there were no other basis for regulation, such as ETPA, there would have been no reason for the phrase in the regulation referring to "the sole basis for such rent regulation."

To hold otherwise would negate the intent of the Loft Law, which was not to supplant rent regulation. Indeed, at the time of passage of the Loft Law, lofts that met statutory requirements were covered by the rent regulations, and this was not altered by

the Legislature in passing the Loft Law or the amendment to EPTA (*see Mandel v Pitkowsky*, 102 Misc 2d 478 [App Term 1979], *affd* 76 AD2d 807 [1980]). Instead, the purpose of the Loft Law was to integrate unregulated loft dwelling units into the coverage of the rent stabilization system, and to harmonize with - rather than displace - existing forms of regulation (*see Blackgold Realty Corp. v Milne*, 119 AD2d 512, 516 [1986], *affd 69 NY2d 719 [1987]*).

Realizing that tenants in such buildings would suffer a great hardship if forced to relocate, the Legislature enacted the Loft Law to allow residential tenants who had moved into nonresidential loft buildings in New York City prior to 1981 to remain in their units while landlords perform the work necessary to legalize the buildings for residential use, within specifically prescribed time periods, culminating in obtaining a certificate of occupancy as a Class A multiple dwelling for the residential portions of the building or structure.[6] When a unit comes out of the Loft Law, it then goes into rent stabilization

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[6] The Loft Law established a mechanism for the procurement of a residential certificate of occupancy, during which time the loft tenants were covered by rent regulation pursuant to section 286 of the MDL and the Loft Board regulations. Once a residential certificate of occupancy was obtained, the tenancy became rent stabilized under the auspices of the New York State Division of Housing and Community Renewal.

if it is otherwise covered. In contrast here, by maintaining the residential use of the unit and claiming exemption from regulation, rather than converting it to nonresidential use as contemplated by 29 RCNY § 2-10 [c] -- pursuant to which "the owner is relieved of its obligations to comply with the requirements of Article 7-C" -- the owner's construction of the law to exempt it from rent regulation requirements would appear to subvert the very intention of the Loft Law to promote residential legalization.

The owner's reliance on *Wolinsky* v *Kee Yip Realty Corp.* is misplaced. There, the tenants did not seek protection under the Loft Law since they had illegally converted their commercially leased units, at their own expense, over a decade after the Loft Law's eligibility period ended. In addition, the building in question did not have a residential certificate of occupancy and the applicable zoning did not permit residential use. The tenants sought a declaration that "notwithstanding their illegal use of the space, they [we]re protected by the Rent Stabilization Law and Rent Stabilization Code through the ETPA" (2 NY3d at 490). The *Wolinsky* Court found that reading the Loft Law and ETPA together, the "tenants' illegal conversions do not fall under the ambit of the ETPA," noting that if the previously enacted ETPA "already protected illegal residential conversions

of manufacturing space, significant portions of the Loft Law would have been unnecessary" (*id.* at 493).

We decline to join the Second Department *(see e.g. Caldwell v American Package Co., Inc.*, 57 AD3d 15 [2008]; *Gloveman Realty Corp. v Jefferys*, 18 AD3d 812 [2005]) in reading *Wolinsky* as providing a blanket prohibition barring ETPA coverage of all loft units not subject to the Loft Law, even where the Zoning Resolution permits residential use as of right. In our view, *Wolinsky* stands for nothing more than the proposition that illegal loft units are not entitled to rent stabilization treatment when the unit is incapable of being legalized. Indeed, the Court of Appeals acknowledged *in Wolinsky* the possibility that ETPA could provide protection to such tenancies capable of becoming legalized. It explicitly noted that the City of New York in that case had "not acted to amend the Zoning Resolution to include purely residential use . . . or to rezone tenants' neighborhood . . . Such steps could make residential loft units like tenants' legal or capable of being legalized" (2 NY3d at 493).

Significantly, focusing on *Wolinsky*'s statement quoted immediately above, this Court has held that rent stabilization under ETPA may apply to a loft unit otherwise not covered by the

Loft Law where the unit is capable of legalization (*see 142 Fulton LLC v Hegarty*, 41 AD3d 286, 288 [2007]; *Duane Thomas LLC v Wallin*, 35 AD3d 232 [2006]; *see also Matter of 315 Berry St. Corp.*, 39 AD3d at 657). For instance, in *Duane Thomas*, this Court affirmed Supreme Court's declaration that a loft unit not covered by the Loft Law was still covered by rent stabilization, holding (35 AD3d at 233):

> Although tenant commenced occupancy in 1991, after the Loft Law window period had closed without the subject unit having been registered with the Loft Board, the applicable Zoning Resolution (Tribeca Mixed Use District) permits residential use of 'loft dwellings,' which the subject building admittedly is, and does not expressly require that such dwellings be covered by the Loft Law. In fact, a temporary residential certificate of occupancy covering the unit was obtained by landlord in 2002, in accordance with the parties' 2001 agreement [citations omitted]. It therefore appears that the unit is capable of being legalized and may therefore be subject to rent stabilization.

As the foregoing analysis illustrates, nothing in *Wolinsky* compels us to overrule our holding in *182 Fifth Ave.*, which is dispositive of the issue here. Where zoning expressly allows residential use as of right, and apartments can be legalized by the owner filing a certificate of occupancy, there is no rationale under *Wolinsky* to foreclose ETPA coverage. To do so would be to deny the effect to that part of *Wolinsky* that relied upon the impossibility of conforming with the Zoning Resolution

as its basis for denying ETPA coverage. We thus adhere to our prior determination that where, as here, the pre-1974 building contains six or more residential units, it is subject to rent stabilization by virtue of ETPA "notwithstanding the sale of Loft Law rights by a prior tenant."

Accordingly, the order and judgment (one paper) of Supreme Court, New York County (Marcy S. Friedman, J.), entered June 19, 2008, which, inter alia, granted plaintiff Rosenthal's motion for summary judgment and declared his unit subject to rent stabilization pursuant to the Emergency Tenant Protection Act of 1974, should be affirmed, without costs.

All concur.

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

ENTERED: DECEMBER 10, 2009