SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

CORRECTED ORDER - DECEMBER 16, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, McGuire, Acosta, Roman, JJ.

1488 Juanita Clotter, Index 24263/03
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant,

Metropolitan Transportation Authority,
Defendant.

Steve S. Efron, New York, for appellant.

Segal & Lax, LLP, New York (Patrick Daniel Gatti of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered July 22, 2008, upon a jury verdict, awarding plaintiff $1.2 million for past pain and suffering, $1 million for future pain and suffering, $100,000 for past lost earnings, and $600,000 for future lost earnings, as against defendant-appellant New York City Transit Authority, modified, on the facts, to vacate the awards for past and future pain and suffering, and the matter remanded for a trial solely on the issue of damages for past and future pain and suffering, and otherwise affirmed, without costs, unless plaintiff, within 30 days of service of a copy of this order with notice of entry,

stipulates to reduce the awards for past and future pain and suffering to $800,000 each, and to entry of an amended judgment in accordance therewith.

The trial evidence established that plaintiff fell due to a defect on a stairway leading into a Transit Authority subway entrance. The cause of the defect was adequately established by plaintiff and her expert by use of, inter alia, plaintiff's photographs (*see Hoerner v Chrysler Fin. Co., L.L.C.*, 21 AD3d 1254, 1255 [2005]). We find no fault with the method used by plaintiff's expert, which defendant's expert also used.

Plaintiff's awards for past and future lost earnings were supported by her expert. Defendant's expert proffered no testimony as to what plaintiff's future lost earnings would be, other than to note that she would have used the analysis of plaintiff's expert had she projected future earnings. Since defendant failed to present expert testimony of its own, "the jury could therefore have properly relied upon the testimony of plaintiff's expert" (*Hoerner*, 21 AD3d at 1256).

The awards for past and future pain and suffering are excessive. Plaintiff sustained a ruptured quadriceps tendon and an avulsion fracture requiring hospitalization and surgery to repair the rupture, was left with a seven-inch scar as a result of the injury and surgery, and is unable to walk without the use of crutches or a cane. For these injuries, resulting in a

partial permanent disability to a 46-year-old woman, the sum of $800,000 for each of past and future pain and suffering is a more appropriate award (*see Orellano v 29 E. 37th St. Realty Corp.*, 4 AD3d 247 [2004], *lv denied* 4 NY3d 702 [2004]).

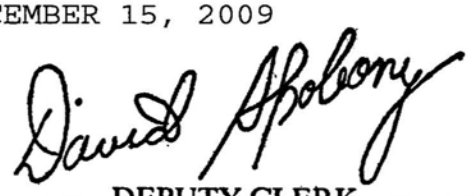
All concur except McGuire, J. who concurs in a separate memorandum as follows:

McGUIRE, J. (concurring)

The 46-year-old plaintiff sustained a ruptured quadriceps tendon and a small avulsion fracture of her right patella requiring hospitalization and surgery. I agree with the majority that the award of damages for past and future pain and suffering is excessive. However, in my view, a substantial additional reduction of the award is warranted. The award must not "deviate[] materially from what would be reasonable compensation" (CPLR 5501[c]) and plaintiffs who suffered similar or more severe injuries have been awarded substantially less (*see e.g. Orellano v 29 E. 37th Street Realty Corp.*, 4 AD3d 247 [1st Dept 2004], *lv denied* 4 NY3d 702 [2004] [$375,000 for each of past and future pain and suffering where 47-year-old plaintiff suffered comminuted fracture of tibia and fibula requiring several surgical procedures during two-month hospital stay and resulting in partial permanent disability]). Inexplicably, the majority cites *Orellano* in support of the reduced award it thinks appropriate.

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

ENTERED: DECEMBER 15, 2009



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Gonzalez, P.J., Tom, Andrias, Nardelli, Richter, JJ.

1641N Briarpatch Limited, L.P., et al., Index 603364/01
Plaintiffs-Appellants-Respondents,

-against-

Briarpatch Film Corp., et al.,
Defendants,

Verner Simon P.C., et al.,
Defendants-Respondents-Appellants.

Barry L. Goldin, New York, for appellants-respondents.

Furman, Kornfeld & Brennan LLP, New York (A. Michael Furman of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered August 20, 2009, as amended September 24, 2009, which marked plaintiffs' discovery motion and the cross motion of defendants Verner Simon P.C. and Paul W. Verner off calendar with leave to renew, and denied plaintiffs' motion to reassign this case to Justice Bransten, unanimously modified, on the law, to the extent of remanding the matter as indicated herein, and otherwise affirmed, without costs.

The Rules of the Commercial Division (22 NYCRR 202.70[g], Rule 24) provide for a pre-motion conference to be held in nondiscovery disputes. The motion court's part rule states that "[d]iscovery disputes should first be addressed through a court conference prior to the filing of a motion." Both rules further

provide that a party's failure to comply may result in the motion being held in abeyance until the court has the opportunity to conference the matter. Neither side requested a pre-motion conference prior to filing the motion and the cross motion. Based on this procedural failure, the court marked both the motion and the cross motion off calendar with leave to renew after plaintiffs' compliance with the rules.[1] Rather than marking the motions off calendar, the motion court should have scheduled a conference and then decided the motions if the conference did not resolve the parties' disputes (*see generally Costigan & Co. v Costigan*, 304 AD2d 464 [2003]). Although the parties have briefed the merits on this appeal, the motion court never ruled on the issues presented in the motion or the cross motion. Accordingly, the matter is remanded for the court to hold whatever conference it deems appropriate and, if any such conference does not resolve the disputes, to decide the discovery motion and the cross motion (*see Barrett v Toroyan*, 35 AD3d 278 [2006]).

The court did not improvidently exercise its discretion by refusing to transfer this case to Justice Bransten. The action

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[1] Although the court's order does not specifically reference the cross motion, it is apparent that the order covered both the motion and the cross motion.

before Justice Bransten (*Briarpatch Ltd., L.P. v Geisler*, Index No. 603820/99) has no active defendants, and the instant case has been before the current Justice since 2007.

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

ENTERED: DECEMBER 15, 2009

Gonzalez, P.J., Moskowitz, DeGrasse, Manzanet-Daniels, Roman, JJ.

1768-
1769-
1770 The People of the State of New York,
Respondent,

-against-

Dan Landy,
Defendant-Appellant.

Ind. 5996/02

Dan Landy, appellant pro se.

Robert M. Morgenthau, District Attorney, New York (Paula-Rose Stark of counsel), for respondent.

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered October 22, 2003, convicting defendant, after a jury trial, of burglary in the first degree, robbery in the third degree (two counts), attempted robbery in the third degree and criminal possession of a weapon in the third degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 20 years to life, and order, same court and Justice, entered on or about April 16, 2004, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

The court properly denied defendant's suppression motion in all respects. The description of defendant was sufficiently detailed, given the temporal and spatial factors (*see e.g. People v Rampersant*, 272 AD2d 202 [2000], *lv denied* 95 NY2d 870 [2000]), so as to provide, at the very least, reasonable suspicion

warranting an investigatory detention of defendant for prompt identification by the victims (*see People v Hicks*, 68 NY2d 234, 238-239 [1986]). The manner in which the showup was conducted was not unduly suggestive, given the chain of fast-paced events (*see People v Wilburn*, 40 AD2d 508, 509 [2007], *lv denied*, 9 NY3d 833 [2007]; *People v Williams*, 15 AD3d 244, 246 [2005], *lv denied*, 5 NY3d 771 [2005]). Defendant's statements to the police were spontaneous and not the product of interrogation or its functional equivalent (*see People v Campney*, 94 NY2d 307, 314 [1999]).

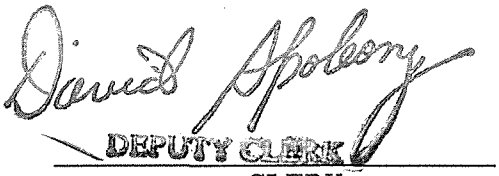
The verdict was based on legally sufficient evidence. The dangerous instrument element of first-degree burglary under Penal Law § 140.30(3), as well as the force element of robbery, was established by evidence that, during the commission of the crime, defendant possessed a sharp piece of metal capable of causing injury, and that he displayed it in a manner that conveyed a threat to stab the victims if they did not comply with his demand for money (*see People v Carter*, 53 NY2d 113, 116 [1981]; *People v Pena*, 50 NY2d 400, 407-408 [1980], *cert denied* 449 US 1087 [1981]).

Defendant's claims regarding the prosecutor's conduct in cross-examination and summation, and regarding the sufficiency of the court's jury instructions, are unpreserved and we decline to review them in the interest of justice. As an alternative

holding, we also reject them on the merits. Defendant's pro se speedy trial claim is without merit. Defendant's remaining pro se claims are unpreserved or otherwise procedurally defective and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: DECEMBER 15, 2009



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Gonzalez, P.J., Moskowitz, DeGrasse, Manzanet-Daniels, Roman, JJ.

1771-
1772 Putnam Leasing Company, Inc., Index 603548/08
Plaintiff-Appellant,

-against-

ATL, Inc., et al.,
Defendants-Respondents.

Kenneth L. Small, New York, for appellant.

Judgment, Supreme Court, New York County (Edward H. Lehner, J.), entered June 26, 2009, awarding plaintiff the principal sum of $14,308.75, plus costs and disbursements, and interest in the amount of $1,648.31, unanimously modified, on the law and the facts, the damage award increased to a principal sum of $32,808.75, and the matter remanded for a recalculation of interest and entry of an amended judgment, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered May 26, 2009, which, following an inquest, awarded plaintiff damages for breach of the automobile lease, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Contrary to the court's conclusion, the parties' lease and "open-end purchase option rider" clearly provided that in the event of a breach by the defendant lessee or the lessee's failure to exercise its right under the purchase rider option (both of which occurred here), plaintiff lessor would be entitled to

recover the amounts specified in paragraphs 2 and 5 of the rider. Paragraph 8 further provided that to the extent there was any inconsistency between the lease and rider, the latter would "supersede" the former in resolving the conflict.

Since the relevant lease and rider provisions were complete, clear and unambiguous on their face, they must be enforced according to their plain meaning (*see Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). In essence, the parties agreed that the post-lease residual value of the vehicle, combined with a reasonable profit to be earned by the lessor upon a post-lease sale, was $100,000. This liquidated damage figure was based on agreement that the vehicle was a customized Bentley with personally selected accessories; that plaintiff generally was not in the business of selling used vehicles at retail; and that in light of anticipated difficulty in determining the general market or trade-in value at lease termination, plaintiff would dispose of it at wholesale should defendant decline to exercise its option to purchase under the rider.

The contractual damages fixed by the lease and rider were reasonable in proportion to the probable loss, inasmuch as actual anticipated loss was difficult to estimate at the time of contracting (*see Truck Rent-A-Center v Puritan Farms 2nd*, 41 NY2d 420 [1977]; *see also JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373 [2005]). However, we now have a record that includes

the actual sale price of the used vehicle ($76,000), as well as accumulated fees and charges ($3,042.75), delinquencies ($11,266) and lessee payments ($5,500) since the termination of the lease. When these figures -- uncontested on this appeal -- are factored in, it becomes clear that the deficiency balance was understated by $18,500 in the principal damage award.

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

ENTERED: DECEMBER 15, 2009

Gonzalez, P.J., Moskowitz, DeGrasse, Manzanet-Daniels, Roman, JJ.

1773 In re Devon N.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

Tamara A. Steckler, The Legal Aid Society, New York (Louise Feld of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Norman Corenthal of counsel), for presentment agency.

Order of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about March 17, 2009, which adjudicated appellant a juvenile delinquent, upon his admission that he committed an act which, if committed by an adult, would constitute the crime of grand larceny in the fourth degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion in declining to grant appellant an adjournment in contemplation of dismissal. The underlying offense was serious and violent, and the record establishes that probation was the least restrictive alternative

consistent with appellant's needs and the needs of the community (*see Matter of Katherine W.*, 62 NY2d 947 [1984]).

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

ENTERED: DECEMBER 15, 2009

Gonzalez, P.J., Moskowitz, DeGrasse, Manzanet-Daniels, Roman, JJ.

1775 The People of the State of New York, Ind. 6101/07
Respondent,

-against-

Amaury Arrieta, etc.,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Carol A. Zeldin 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 (Charles H. Solomon, J.), rendered on or about July 15, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTERED: DECEMBER 15, 2009

DEPUTY CLERK

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

Gonzalez, P.J., Moskowitz, DeGrasse, Manzanet-Daniels, Roman, JJ.

1777 Robert T. Giaimo, etc., Index 113575/07
Plaintiff-Appellant,

-against-

EGA Associates Inc., et al.,
Defendants-Respondents.

Putney, Twombly, Hall & Hirson LLP, New York (Philip H. Kalban of counsel), for appellant.

Holland & Knight LLP, New York (Mitchell J. Geller of counsel), for respondents.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered October 30, 2008, which denied plaintiff's motion for summary judgment on his claims for declaratory and injunctive relief, and granted defendants' cross motion for leave to amend the answer to add an affirmative defense, unanimously reversed, on the law, with costs, plaintiff's motion granted and defendants' cross motion denied, it is declared that the purported transfer and sale of one share of stock from the decedent Edward P. Giaimo, Jr., to defendant Janet Giaimo Vitale is null and void ab initio, defendant EGA Associates Inc. is directed to cancel any and all share certificates issued to Janet and Edward on or after March 13, 2007 and to issue new share certificates to Edward's estate and to Janet in the same share amounts as reflected in the certificates that existed as of March 12, 2007, and it is declared that any actions and resolutions

passed at the shareholders meeting on July 23, 2007, including the election of Joseph O. Giaimo as a director, and at a meeting of the board of directors on July 30, 2007 are null and void.

The transfer restrictions printed on the back of the share certificates should have been enforced (*see Matter of Penepent Corp.*, 96 NY2d 186, 192 [2001]; *Gallagher v Lambert*, 74 NY2d 562, 567 [1989]; Uniform Commercial Code § 8-204). The restrictions prohibit the transfer of shares without granting the corporation 30 days' written notice and the first option to purchase the shares. The corporation was owned in equal shares by Edward P. Giaimo, Jr., now deceased, and his two siblings, plaintiff Robert T. Giaimo and defendant Janet Giaimo Vitale. We reject defendants' argument that, as the president of the corporation, Edward was authorized to sell a controlling share of stock to Janet because he had offered it first to the corporation, through himself, and the corporation, through him, had waived its right to purchase it. As the president of a closely held corporation, Edward lacked the power to act unilaterally against Robert's interest (*see Barbour v Knecht*, 296 AD2d 218, 227 [2002]; *see also Tidy-House Paper Corp. of N.Y. v Adlman*, 4 AD2d 619, 621 [1957]; *Sterling Indus. v Ball Bearing Pen Corp.*, 298 NY 483, 491 [1948]).

Defendants' proposed affirmative defense, that the transfer restrictions are invalid, is without merit. Their argument that

such restrictions are invalid if there are no corporate documents evidencing their approval is unsupported in law. Moreover, the three shareholders accepted these restrictions without objection and relied on them until after this litigation was commenced (see *Cannavino v Davis*, 289 AD2d 360 [2001]).

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

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

ENTERED: DECEMBER 15, 2009

Gonzalez, P.J., Moskowitz, DeGrasse, Manzanet-Daniels, Roman, JJ.

1778 The People of the State of New York, Ind. 1110/06
Respondent,

-against-

Fateen Naji,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Richard Nahas 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 (Laura Ward, J.), rendered on or about February 15, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTERED: DECEMBER 15, 2009

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

Gonzalez, P.J., Moskowitz, DeGrasse, Manzanet-Daniels, Roman, JJ.

1779 The People of the State of New York, Ind. 4244/06
Respondent,

-against-

Doniell Rawlings,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered September 18, 2007, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to a term of 7 years, unanimously affirmed.

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

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

ENTERED: DECEMBER 15, 2009

DEPUTY CLERK

Gonzalez, P.J., Moskowitz, DeGrasse, Manzanet-Daniels, Roman, JJ.

1780-
1781 In re Alicia Monique S.,

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

Oswald S.,
Respondent-Appellant,

Leake & Watts Services, Inc.,
Petitioner-Respondent.

Patricia W. Jellen, Eastchester, for appellant.

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

Tamara A. Steckler, Esq., The Legal Aid Society, New York (Claire V. Merkine of counsel), Law Guardian.

Order, Family Court, New York County (Susan R. Larabee, J.), entered on or about May 19, 2008, which denied respondent father's motion to vacate a prior dispositional order terminating his parental rights and committing the child to the custody of petitioner's predecessor for the purpose of adoption, unanimously affirmed, without costs.

Upon conclusion of the dispositional hearing and prior to the court's 2004 order, the child was removed from her pre-adoptive foster home due to a founded report of excessive corporal punishment by the foster mother. Respondent has failed to meet his heavy burden of showing this evidence could not have

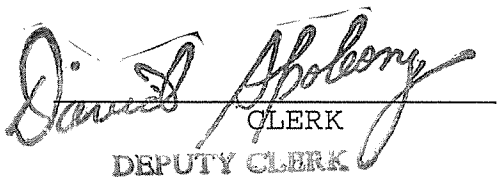
been discovered earlier with due diligence (*see H & Y Realty Co. v Baron*, 193 AD2d 429, 430 [1993]). Moreover, he failed to establish that this evidence, "if introduced at the trial, would probably have produced a different result" (CPLR 5015[a][2]), as the child's relationship with her then pre-adoptive foster family was one of six factors considered by the court in reaching its dispositional determination; there is no indication, in the record of that proceeding, of progress by respondent, who did not present any evidence at the hearing and had only sporadic visitation with the child (*cf. Matter of Christina Janian E.*, 260 AD2d 300 [1999]). Moreover, the mere absence of "a viable adoptive resource at the time of the termination" of parental rights "does not become a reason to subsequently vacate the order terminating the parental rights of the parent" (*Matter of Anthony S.*, 178 Misc 2d 1, 8 [1998]).

Given respondent's failure to make any showing of his ability to care for the child or address the court's earlier concerns, there would have been no purpose in ordering a new dispositional hearing as to the child's best interests (*see Matter of Shamia J.*, 188 AD2d 344 [1992], *lv dismissed* 81 NY2d 954 [1993]).

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

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

ENTERED: DECEMBER 15, 2009



Gonzalez, P.J., Moskowitz, DeGrasse, Manzanet-Daniels, Roman, JJ.

1782 The People of the State of New York, Ind. 6016/05
Respondent,

-against-

Gerald Agnew,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (John B.F. Martin of counsel), for respondent.

Order, Supreme Court, New York County (Ronald A. Zweibel, J.), entered on or about January 12, 2009, which adjudicated defendant a level three sex offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly applied the presumptive override for a prior felony sex crime conviction, and properly denied defendant's request for a downward departure (*see People v Judd*, 29 AD3d 431 [2006], *lv denied* 7 NY3d 709 [2006]). There is no support for defendant's position that the override was not intended to apply when one of the felonies involved an undercover operation, rather than an actual underage victim. Defendant's conduct demonstrated a high risk of sexual recidivism, not lessened by the fact that the crime was only an attempt, or the

fact that the intended victim, believed by defendant to be a child, was actually an undercover officer.

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

ENTERED: DECEMBER 15, 2009

Gonzalez, P.J., Moskowitz, DeGrasse, Manzanet-Daniels, Roman, JJ.

1783N Juan D. Reyes, M.D., Index 24634/03
Plaintiff-Appellant,

-against-

Rafael Sequeira, M.D., et al.,
Defendants-Respondents,

424 East 138th Street LLC,
Defendant.

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

Mark S. Friedlander, New York, for respondents.

Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered on or about November 12, 2008, which granted defendants' motion to vacate a stipulation of settlement and restore the action to the trial calendar, unanimously reversed, on the law, with costs, and the stipulation of settlement reinstated.

Pursuant to an on-the-record "so ordered" stipulation of settlement dated January 29, 2007, the parties agreed, among other things, that the court would appoint two appraisers to determine the present fair market value of the properties at issue, that the court would determine the value based upon an average of the two appraisals, and that defendant would be awarded 55% and plaintiff 45% of the value of both properties. The parties further agreed that a more formal agreement would be made within 10 days after the parties received the appraisals,

the objective being to settle all collateral issues, and that the formal agreement would in no way modify, alter or amend the January 29, 2007 stipulation.

This stipulation constituted a binding agreement, as it set forth all the essential terms and conditions of a binding agreement and, despite contemplating a more formal agreement on collateral issues, the parties clearly intended to be bound by it with respect to the agreed upon terms (*see Rowley v Amrhein*, 64 AD3d 469 [2009]; *High v Reuters Am., Inc.*, 19 AD3d 284 [2005]; *Storette v Storette*, 11 AD3d 365 [2004]).

Further, in August 2007, the January 29, 2007 stipulation was properly modified, by way of stipulation, to provide, at defendant's request, for a third appraisal of the properties.

M-5002 - Reyes v Sequeira, et al.,

Motion seeking an order for a preference denied as academic.

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

ENTERED: DECEMBER 15, 2009

Gonzalez, P.J., Moskowitz, DeGrasse, Manzanet-Daniels, Roman, JJ.

1784N Dolores Tomaino, et al., Index 111817/06
Plaintiffs-Respondents,

-against-

209 East 84 Street Corp.,
Defendant-Appellant.

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

Alpert & Kaufman, LLP, Garden City (John V. Decolator of counsel), for respondents.

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered May 6, 2009, which denied defendant's motion to vacate the note of issue and compel discovery, unanimously affirmed, without costs.

Although plaintiffs' certificate of readiness incorrectly states that disclosure was completed, the misstatement was at worst technical, and defendant's motion to vacate the note of issue was properly denied.

Plaintiffs allege that on June 30, 2006, plaintiff Dolores Tomaino fell on a staircase in defendant's building and suffered a fractured left humerus and other injuries; the humeral fracture was surgically repaired on June 6, 2007 through open reduction with internal fixation; she suffered pulmonary embolisms the day after this surgery; she fell again in December 2007, fracturing her right rib; and the repair of the left humerus subsequently

failed, requiring a second surgery on the left humerus in March 2008 to install an artificial humeral head. Plaintiff seeks damages for her injuries and also asserts a claim for lost earnings.

At a compliance conference held on December 5, 2008, the court, responding to defendant's demand for medical records relating to a cardiac catheter ablation procedure performed on plaintiff in 2005, directed plaintiff to submit to a vascular independent medical examination by defendant's vascular surgeon, Dr. Svahn, and directed defendant to produce the IME report within 20 days of the examination. The court further ordered that "[i]f plaintiff's prior heart treatment is deemed relevant by Dr. Svahn," then plaintiff must "provide such records or authorization." The order did not grant defendant relief on any of its other outstanding discovery demands, including the three at issue on this appeal -- medical records relating to a fracture of plaintiff's ring finger in 2002 and to her fall and rib fracture in December 2007, and records relating to a home equity loan that plaintiff took out around October 2007, allegedly to support herself.

Dr. Svahn examined plaintiff on December 18, 2008. At the final compliance conference held on January 26, 2009, the court directed defendant to produce, among other things, the overdue IME report from Dr. Svahn, directed plaintiffs to file a note of

issue by February 27, 2009, and, again, did not address any of defendant's other demands. The next day, January 27, 2009, plaintiff filed a note of issue, even though defendant still had not produced Dr. Svahn's IME report, and thus there was no way to know whether the IME report would indicate a need for plaintiff to produce cardiac-related records.

Plaintiffs' certificate of readiness was therefore incorrect, and the note of issue was filed prematurely. Dr. Svahn's report, dated December 31, 2008, was produced by defendant on January 30, 2009; it states that the embolisms were "a direct causal result of undergoing the initial orthopedic surgical procedure on June 6, 2007, which is directly causally related to her fall [on] June 30, 2006." Thus, by the time defendant made its motion to vacate the note of issue on February 13, 2009, all court-ordered discovery had been completed, as Dr. Svahn's report, which was part of the record on the motion, indicated that there was no need for the heart ablation records. The technical prematurity of plaintiffs' note of issue having been cured by January 30, 2009, before defendant filed its motion, the court's disregard thereof was a proper exercise of discretion.

Apart from the possible preclusive effect of the conference orders, defendant should not have the additional disclosure it seeks. Defendant's request for records relating to plaintiff's

2005 heart ablation procedure is based on the theory that her preexisting heart condition may have contributed to the pulmonary embolisms she suffered after her June 2007 surgery; this theory is thoroughly undermined by Dr. Svahn's report. The absence in Dr. Svahn's report of any request for the heart ablation records is highlighted by her later two-sentence affirmation, dated March 20, 2009, subsequent to plaintiffs' opposition papers on the motion dated March 3, 2009, in which she states that the "records of the plaintiff's prior heart ablations may assist me." That affirmation was submitted for the first time with defendant's reply papers, and therefore need not be considered (*see Scansarole v Madison Sq. Garden, L.P.*, 33 AD3d 517, 518 [2006]). Similarly, the only basis articulated for defendant's request for records relating to plaintiff's fracture of her ring finger in 2002 is that those records may shed some light on plaintiff's heart condition.

Defendant contends that medical records relating to plaintiff's December 2007 fall and right rib fracture might show a causal relationship between the fall and plaintiff's need to have her left humeral head replaced in March 2008. In his initial IME report dated November 10, 2008, however, defendant's orthopedist, Dr. Bazos, found that "all [plaintiff's] injuries are causally related to the slip and fall of June 30, 2006"; the report makes no mention of the December 2007 fall and rib

fracture. In a three-paragraph addendum, dated March 6, 2009, Dr. Bazos does mention the December 2007 fall, speculating that the "fall perhaps accelerated" plaintiff's need for an artificial left humeral head. As with Dr. Svahn's supplemental affirmation, however, Dr. Bazos' addendum need not be considered, as it too was submitted with defendant's reply papers.

Finally, defendant asserts that home equity loan materials it seeks will shed light on plaintiff's income. Defendant does not dispute that plaintiff has already produced proof of her past income, including tax returns for the tax years 2005 through 2008. In light of plaintiff's production of four years of tax returns, defendant's request for home equity loan application materials is overbroad and unduly burdensome (*see Editel, N.Y. v Liberty Studios*, 162 AD2d 345 [1990]).

We have considered and rejected defendant's remaining arguments.

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

ENTERED: DECEMBER 15, 2009

Gonzalez, P.J., Moskowitz, DeGrasse, Manzanet-Daniels, Roman, JJ.

1785N Panasia Estates, Inc., Index 602472/05
Plaintiff-Appellant-Respondent,

-against-

Hudson Insurance Company, et al.,
Defendants-Respondents-Appellants.

Peckar & Abramson, P.C., New York (Michael S. Zicherman of counsel), for appellant-respondent.

White, Fleischner & Fino, LLP, New York (Janet P. Ford of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered March 6, 2009, which granted plaintiff's motion to amend the complaint to add a cause of action for breach of contract, unanimously reversed, on the law, with costs, and the motion denied.

Plaintiff is correct in arguing that the motion court erred by stating that consequential damages do not lie for breach of an insurance contract absent bad faith, since the determinative issue is whether such damages were "within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting" (*Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.*, 10 NY3d 187, 192 [2008] [internal quotation marks and citation omitted]; *see Panasia Estates, Inc. v Hudson Ins. Co.*, 10 NY3d 200, 203 [2008]). However, the motion to amend the complaint should not have been granted since the breach of

contract claim that plaintiff sought to add was duplicative of its existing claim for breach of the implied covenant of good faith (*see Canstar v Jones Constr. Co.*, 212 AD2d 452, 453 [1995]). Furthermore, contrary to defendants' contention, plaintiff's claim for consequential damages in its cause of action for breach of the implied covenant of good faith was not insufficiently pled. The reference to such damages as "special" in *Bi-Economy Mkt.* (10 NY3d at 192) was not intended to establish a requirement of specificity in pleading.

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

ENTERED: DECEMBER 15, 2009

Gonzalez, P.J., Moskowitz, DeGrasse, Manzanet-Daniels, Roman, JJ.

1786N-
1787N Armin A. Meizlik Co. Inc., etc., et al., Plaintiffs-Respondents,

-against-

L&K Jewelry Inc., et al., Defendants-Appellants.

[And a Third-Party Action]

Index 602296/06

Meltzer, Lippe, Goldstein & Breitstone, LLP, Mineola (Michael H. Masri and Alexander Leong of counsel), for appellants.

Bronstein, Gewirtz & Grossman, LLC, New York (Edward N. Gewirtz of counsel), for respondents.

Appeal from order, Supreme Court, New York County (Bernard J. Fried, J.), entered May 23, 2008, which, upon defendants' default, granted plaintiffs' motion pursuant to CPLR 3126 to strike defendants' answer, unanimously dismissed, without costs, as taken from a nonappealable order. Order, same court and Justice, entered September 11, 2008, which denied defendants' motion to vacate the May 23 order, unanimously reversed, on the facts, with costs, the May 23 order vacated, and plaintiffs' motion to strike defendants' answer denied.

The May 23 order granting plaintiff's CPLR 3126 motion was one entered on default within the meaning of CPLR 5511 and is nonappealable (*see Fox v T.B.S.D., Inc.*, 278 AD2d 612, 613-614 [2000], *lv denied* 96 NY2d 716 [2001]; *Benitez v Olson*, 29 AD3d 503 [2006]; *see also Figiel v Met Food*, 48 AD3d 330 [2008]).

Defendants' motion to vacate the May 23 order sufficiently showed a meritorious defense, namely, that the diamonds sold or consigned to defendants had been stolen, and a reasonable excuse for the failure to prepare timely written opposition to the CPLR 3126 motion, namely, that the individual defendant's serious illness, the unavailability of defendants' original attorney due to foreign travel until a few days before the return date, and the recent retention of co-counsel made it difficult for the attorneys to coordinate with defendants during the seven-day period between the signing of the order to show cause that brought on the motion and its return date. The record also shows that at oral argument of the CPLR 3126 motion, co-counsel was prepared to immediately produce documents purportedly responsive to defendants' demands, which documents were attached to defendants' motion to vacate. The evidence of the individual defendant's illness shows that she has been unable to participate in the litigation, and warrants denial of plaintiffs' motion to strike (*see Grabow v Blue Eyes*, 123 AD2d 155 [1986]).

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

ENTERED: DECEMBER 15, 2009

Gonzalez, P.J., Moskowitz, DeGrasse, Manzanet-Daniels, Roman, JJ.

1788N Richard Maldonado, Index 302957/08
Plaintiff-Respondent,

-against-

Algil Holding Co., LLC.,
Defendant-Appellant.

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

Getz & Braverman, P.C., Bronx (James P. Benintendi of counsel), for respondent.

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about July 20, 2009, which granted plaintiff's show-cause motion to vacate a default and restore this action to the calendar, unanimously affirmed, without costs.

Plaintiff demonstrated a reasonable excuse by showing that his default resulted from law office failure to calendar and timely oppose defendant's discovery motion (*see Simpson v Tommy Hilfiger U.S.A., Inc.*, 48 AD3d 389, 392 [2008]), and also demonstrated merit to his cause (*see Palermo v Lord & Taylor*, 287 AD2d 258, 260 [2001]).

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

ENTERED: DECEMBER 15, 2009

Gonzalez, P.J., Moskowitz, DeGrasse, Manzanet-Daniels, Román, JJ.

1789N Robert Leetom, Index 301459/08
Plaintiff-Appellant,

-against-

Jason Roger Bell, M.D., et al.,
Defendants-Respondents,

Frank Javier Garrido, M.D.,
Defendant.

Tomkiel & Tomkiel, New York (Valerie J. Crown of counsel), for appellant.

Ivone, Devine & Jensen, LLP, Lake Success (Brian E. Lee of counsel), for Jason Roger Bell, M.D., Jose D. Torres, M.D., Edgar Ramos, P.A. and New York Hospital Medical Center of Queens, respondents.

Keller, O'Reilly & Watson, P.C., Woodbury (Jessica L. Darrow of counsel), for Charles Mack, M.D., respondent.

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered January 26, 2009, which, insofar as appealed from as limited by the briefs, granted defendant Charles Mack, M.D.'s motion to reargue, and, upon reargument, vacated the court's prior order entered July 30, 2008 and granted defendant Mack's original application to change venue from Bronx County to Nassau County, unanimously reversed, on the law and the facts, without costs, the motion denied, and the action retained in Bronx County.

The motion court erred in finding that plaintiff was not a resident of Bronx County when he commenced his action against

defendants (CPLR 503[a]). In fact, the evidence established that plaintiff moved to the James J. Peters VA Medical Center in the Bronx (the Bronx VA) to convalesce after suffering a medical condition that caused him to lose the use of his legs. When he commenced this action, plaintiff had been living in the Bronx VA for nearly a year, and indeed, was unable to move back to his prior residence, a second-floor walk-up apartment in Queens. Thus, plaintiff was, in fact, a bona fide Bronx resident at the commencement of his action (*see Blake v Massachusetts Mut. Life Ins. Co.*, 22 AD3d 230 [2005]). Further, the record contains no evidence suggesting that plaintiff assumed temporary residency at the Bronx VA for the sole purpose of obtaining an advantageous venue. Rather, plaintiff's transfer there was for health reasons, and defendants present no evidence to the contrary (*Nunez v Ellenville Community Hosp.*, 41 AD3d 293 [2007]; *Lilly v Ayoub*, 260 AD2d 302 [1999]).

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

ENTERED: DECEMBER 15, 2009

Gonzalez, P.J., Moskowitz, DeGrasse, Manzanet-Daniels, Roman, JJ.

1790N Luis M. Espinoza, Index 14157/06
Plaintiff-Respondent,

-against-

373-381 Park Avenue South, LLC, et al.,
Defendants-Appellants,

Yates Restoration Group Ltd.,
Defendant.

Gallo Vitucci & Klar, New York (Yolanda L. Ayala and Richard J. Gallo of counsel), for appellants.

DeAngelis & Hafiz, Mount Vernon (Talay Hafiz of counsel), for respondent.

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about May 22, 2009, which denied the Park Avenue South and Atco defendants' motion to vacate the note of issue and dismiss the complaint for want of prosecution, unanimously affirmed, without costs.

Contrary to the movants' contention, "Entry of a judgment against a party defaulting in appearance is not mandatory (*Tortorello v Carlin*, 260 AD2d 201, 204 [1999]; *see also Baczkowski v Collins Constr. Co.*, 89 NY2d 499, 504 [1997]). When plaintiff appeared at the hearing, the court had before it the note of issue and the receipt showing that the note had been timely filed, by which point plaintiff had already responded to discovery demands, completed his deposition and submitted to

physical examination by defendants.

The nature and degree of the penalty to be imposed on a motion to dismiss for want of prosecution is a matter of discretion with the court (*Palmenta v Columbia Univ.*, 266 AD2d 90, 91 [1999]). CPLR 3216 is an "extremely forgiving" rule that "never requires, but merely authorizes, the Supreme Court to dismiss a plaintiff's action based on the plaintiff's unreasonable neglect to proceed" (*Davis v Goodsell*, 6 AD3d 382, 383 [2004]). It prohibits dismissal on this ground whenever the plaintiff can show justifiable excuse for the delay and merit to the action (*see* CPLR 3216[e]; *Di Simone v Good Samaritan Hosp.*, 100 NY2d 632 [2003]).

Plaintiff stated in his certificate of readiness that all "known discovery" was complete. One day later, he filed a notice to depose an additional nonparty. By that point, all other discovery had been completed. This is not like the cases where "CPLR 3216 dismissals have been justified based on patterns of persistent neglect, a history of extensive delay, evidence of an intent to abandon prosecution, and lack of any tenable excuse for such delay" (*Schneider v Meltzer*, 266 AD2d 801, 802 [1999]). It appears that plaintiff's omission may have been a mistake, and the minor delay to complete discovery should not require a drastic penalty. Moreover, the complaint and bill of particulars

detail plaintiff's claims under the Labor Law and his alleged injuries, so a credibly meritorious claim can be gleaned from the record, and the movants allege no particular prejudice from the delay (*Weppler v Pretium Assoc.*, 245 AD2d 249, 250-251 [1997]).

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

ENTERED: DECEMBER 15, 2009

Gonzalez, P.J., Moskowitz, DeGrasse, Manzanet-Daniels, Roman, JJ.

1791N Steven L. Aaron, et al., Plaintiffs-Appellants, Index 114029/05

-against-

Greenberg & Reicher, LLP, Defendant-Respondent.

Scott K. Nigro, Long Beach, for appellants.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Christopher Russo of counsel), for respondent.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered October 20, 2008, which denied plaintiffs' motion to vacate an order, same court and Justice, entered March 9, 2007, dismissing the complaint based on plaintiffs' failure to appear at a preliminary conference, unanimously affirmed, without costs.

The motion was properly denied because, in addition to being untimely as it was brought more than one year after the order dismissing the complaint was served upon plaintiffs (CPLR 5015[a][1]), plaintiffs have failed to demonstrate a reasonable excuse for their failure to appear for the preliminary conference following an adjournment that they had requested (*see Fink v Antell*, 19 AD3d 215 [2005]). Plaintiff Fell's assertion that his medical condition prevented him from remembering the adjourned date, or apparently even recalling that the matter had been adjourned, was unsupported by any relevant medical evidence (*see Siskin v 221 Sullivan St. Realty Corp.*, 180 AD2d 544 [1992], *lv*

dismissed 80 NY2d 826 [1992]; *Falso v Norton*, 89 AD2d 635 [1982], *appeal dismissed* 57 NY2d 955 [1982]), and there is no reason proffered for why plaintiff Aaron was unable to remember the adjournment date or to inform the court of his alleged scheduling conflict.

In view of the foregoing, it is unnecessary to consider whether plaintiffs have demonstrated a meritorious cause of action (*see e.g. M.R. v 2526 Valentine LLC*, 58 AD3d 530, 532 [2009]). In any event, we note that they have not set forth such a claim.

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

ENTERED: DECEMBER 15, 2009

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

4461-
4462 Union Carbide Corporation, Index 600804/04
600133/06
Plaintiff-Respondent,

-against-

Affiliated FM Insurance Company, et al.,
Defendants,

Continental Casualty Company, et al.,
Defendants-Appellants.

- - - - -

Union Carbide Corporation,
Plaintiff-Respondent,

-against-

Affiliated FM Insurance Company, et al.,
Defendants,

Continental Casualty Company, et al.,
Defendants-Appellants.

Ford Marrin Esposito Witmeyer & Gleser, LLP, New York, and Carroll, Burdick & McDonough LLP, San Francisco, CA (G. David Goodwin of the Bar of the State of California, admitted pro hac vice, of counsel), for Continental Casualty Company, appellant.

Steptoe & Johnson, LLP, Washington, DC, (James E. Rocap, III and Frank Winston, Jr., of the Bar of the District of Columbia, admitted pro hac vice, of counsel), for American Home Assurance Company, Lexington Insurance Company, American Motorists Insurance Company, St. Paul Fire and Marine Insurance Company and Argonaut Insurance Company, appellants.

Steven R. Gilford, Chicago, IL, of the Bar of the State of Illinois, admitted pro hac vice, and Proskauer Rose LLP, New York, for respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered May 9, 2007, which denied defendants-appellants insurers' motions for partial summary judgment, granted plaintiff

insured Union Carbide's motion for partial summary judgment, and adjudged that the aggregate limits of liability for the policies that defendants-appellants issued to Union Carbide apply on an annual basis, modified, on the law, to deny Union Carbide's motion, and otherwise affirmed, without costs. Order, same court and Justice, entered November 8, 2007, which granted Union Carbide's motion for partial summary judgment and adjudged that a two-month extension of a policy issued by defendant-appellant Continental Casualty Company to Union Carbide carried with it a full $5 million aggregate limit, unanimously reversed, on the law without costs, and the motion denied.

We agree with Judge Martin's analysis in *Maryland Cas. Co. v W.R. Grace & Co.* (1996 WL 169326, 1996 US Dist LEXIS 4500 [SDNY 1996]), as the relevant terms of the multi-year excess policies are indistinguishable from those in *W.R. Grace*. A declaration in each multi-year policy specifies a dollar amount as the "limit of liability" under the policy and states that the limit applies to each occurrence and "in the aggregate." The multi-year excess policies in *W.R. Grace* contained essentially the same language. Like the insured in *W.R. Grace*, Union Carbide seeks "to alter the plain terms of the contract by adding the word 'annual' where it simply does not otherwise exist" (*id.* WL at *5, LEXIS at *15; *see also Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004] ["courts may not by construction add or excise terms"]

[internal quotation marks omitted]). As the phrase "in the aggregate" is unambiguous (*W.R. Grace, id.*), it is of no moment that the excess policies do not contain language elaborating on the phrase that expressly negates in annualization (*see Nissho Iwai Europe v Korea First Bank*, 99 NY2d 115, 121-122 [2002] ["ambiguity does not arise from silence, but from what was written so blindly and imperfectly that its meaning is doubtful"] [internal quotation marks omitted]). Accordingly, we reject Union Carbide's argument that because the excess policies are silent as to whether the limit of liability is annualized, one must look to the underlying policy due to the "follow form" clause in the excess policies. Moreover, the subscription pages of the excess policies state "*[t]his policy being for* [the specified dollar amount], each of the signatories assumes for its Account their [*sic*] indicated quota share amount of the *total* [the specified dollar amount] limit of liability" (emphasis added). This language, to which there was no analogue in *W.R. Grace*, provides additional support for the conclusion that the limit of liability stated in each excess policy is not an annual amount.

Union Carbide's effort to distinguish *W.R. Grace* is unpersuasive. Here, each multi-year excess policy states that the insurance it affords follows form to an underlying policy (a policy with annual limits) "subject to the declarations set forth

below" (one of which, as discussed above, sets forth the limit of liability). In *W.R. Grace*, each multi-year excess policy also stated that the insurance it afforded followed form to an underlying policy (at least one of which had annual limits), but the follow-form clause stated that the excess insurance followed form "except for limits" (*W.R. Grace* at WL *3, LEXIS *10). Contrary to Union Carbide's position, there is no substantive distinction between the "except for" and the "subject to" clauses. The most that can be said is that reading the excess policy to contain the same (i.e., annual) limits of liability as the underlying policy is expressly precluded by the former clause, but is only implicitly precluded by the latter clause. Both clauses, however, plainly state a rule of priority pursuant to which terms of the excess policy governing certain matters control over the terms of the underlying policy governing those matters. If the "subject to" clause does not perform the office of negating terms of the underlying policy that differ from those of the referenced declarations, it is not clear that the clause performs any function (*see Suffolk County Water Auth. v Village of Greenport*, 21 AD3d 947, 948 [2005] ["an interpretation which renders language in the contract superfluous is unsupportable"]; *Helmsley-Spear, Inc. v New York Blood Center*, 257 AD2d 64, 69 [1999] ["[c]ourts should construe a contract so as to give

meaning to all of its language and avoid an interpretation that effectively renders meaningless a part of the contract"]).

The cases on which Union Carbide relies (*Travelers Cas. & Sur. Co. v ACE Am. Reins. Co.*, 392 F Supp 2d 659 [SD NY 2005] *affd* 201 Fed Appx 40 [2d Cir 2006]; *Commercial Union Ins. Co. v Swiss Reins. Am. Corp.*, 413 F3d 121 [1st Cir 2005]; *American Employers' Ins. Co. v Swiss Reinsurance Corp*, 413 F3d 129 [1st Cir 2005]) are distinguishable. In each of these reinsurance cases, the relevant language of the reinsurance certificates differs significantly from that of the excess policies; in the two First Circuit decisions, the court expressly relied in part on the follow-the-fortunes doctrine (*Commercial Union*, 413 F3d at 127-128; *American Employers'*, 413 F3d at 137).

On the extension issue, the burden of proving coverage is on Union Carbide (*Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 218 [2002]), and the policy is ambiguous as to whether it is entitled to $5 million in coverage from Continental for the extended, or "stub," two-month period in question (*see Stonewall Ins. Co. v Asbestos Claims Mgt. Corp.*, 73 F3d 1178, 1216-1217 [2d Cir 1995], *mod on other grounds* 85 F3d 49 [2d Cir 1996]; *United States Min. Prods. Co. v American Ins. Co.*, 348 NJ Super 526, 559, 792 A2d 500, 525 [App Div 2002]). Thus, given the ambiguity, Union Carbide failed to meet its burden of

demonstrating that it is entitled to the full annual limit for the two-month extension and partial summary judgment should not have been granted (*see Uniroyal, Inc. v American Reins. Co.*, 2005 WL 4934215 [NJ Super, App Div 2005]).

All concur except Tom, J.P. who dissents in part in a memorandum as follows:

TOM, J.P. (dissenting in part)

Plaintiff obtained general liability and marine insurance from nonparties Employers Liability Assurance Corp. and Appalachian Insurance Co. These underlying policies each provide an "annual aggregate" limit of liability. Reinsurance (denominated "Excess Policies" by defendants) was provided by appellant insurers under a second tier of policies, each having a three-year duration. Each such excess policy, issued by a group of participating insurers, includes a "follow the form" clause, stating that it "shall follow all the terms, insuring agreements, definitions, conditions and exclusions" of the applicable underlying insurance policy.

Unlike the underlying policies, the excess policies do not expressly state that the aggregate liability of the participating insurers is annual, limiting liability to, for example, "$30,000,000 each occurrence and in the aggregate." The signature page recites, "This policy being for $30,000,000, each of the signatories assumes for its account their indicated quota share amount of the total $30,000,000 limit of liability."

It is the majority's position that despite the provision contained in each excess policy that it reflect the terms and definitions of the underlying policy providing for an annual limit of liability, the aggregate liability limitation of such excess policy is not annual, but extends over its three-year

duration. While, standing alone, an aggregate limit of $30,000,000 contained in a three-year insurance policy might logically be construed as a limit to be applied over the life of the policy, the explicit expression of the parties' intent that the excess policy mirror the terms of the underlying insurance coverage dispels any doubt that the limitation on the coverage afforded is meant to be annualized. As stated in *Commercial Union Ins. Co. v Swiss Reins. Am. Corp.* (413 F3d 121, 128 [1st Cir 2005], quoting *Aetna Cas. & Sur. Co. v Home Ins. Co.*, 882 F Supp 1328, 1337 [SD NY 1995]),

> "'[w]here a following form clause is found in the reinsurance contract, concurrency between the policy of reinsurance and the reinsured policy is presumed, such that a policy of reinsurance will be construed as offering the same terms, conditions and scope of coverage as exist in the reinsured policy, i.e., in the absence of explicit language in the policy of reinsurance to the contrary.'"

The language on the signature page does not detract from this analysis, merely indicating each insurer's *partial* share of the *total* liability, without specifying whether such total is to be aggregated annually or over the duration of the policy.

The unreported case relied upon by the majority, *Maryland Cas. Co. v W.R. Grace & Co.* (1996 WL 169326, 1996 US Dist LEXIS 4500 [SD NY 1996]), is distinguishable in respect of the exception contained in the follow the form clause in the reinsurance policies, which reads: "'Except as otherwise provided

herein the insurance afforded by this policy shall follow the terms, conditions and definitions as stated in the policies of underlying insurance, *except for limits of liability*, any renewal agreement and any obligation to investigate or defend'" (*id.* WL at *3, LEXIS at *9-10). The court noted that "while the policies 'follow form' to the underlying insurance in certain respects, this does not include limits of liability, which are set forth as $5 million for 'each occurrence' and $5 million 'aggregate'" (*id.*). In view of the explicit exception, it is hardly remarkable that the court applied the aggregate limit over the multi-year duration of the excess policies rather than applying an annual limit, as provided in the underlying insurance.

The facts of the matter at bar are consonant with those of *Travelers Cas. & Sur. Co. v. ACE Am. Reins. Co.* (392 F Supp 2d 659 [SD NY 2005], *affd* 201 Fed Appx 40 [2d Cir 2006]), in which the court noted that the inclusion of a follow the form clause in a three-year reinsurance certificate creates a presumption of concurrency with the terms of the underlying policy that can only be overcome "through the placement of explicit liability limitations in the certificate itself" (*id.* at 665). Thus, the court annualized the aggregate limit of liability, holding that because, as here, "the certificates do not clearly or explicitly limit the coverage terms of the underlying policy, the presumption of concurrency between the excess policy and the

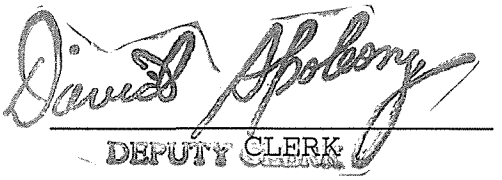
Three-Year Certificates is not overridden" (*id.*).

Plaintiff has submitted an expert's affidavit stating that it is industry custom that liability be aggregated annually, and that "unless a multi-year policy clearly states otherwise, its aggregate limits are understood to apply on an annual basis." However, because the parties' intent to harmonize the terms of the excess policies with those of the underlying policies is apparent and unequivocal, it is unnecessary to consider extrinsic evidence (*see R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29, 33 [2002]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 163 [1990]). Even if an ambiguity could be said to be presented and the proffered affidavit is deemed to be conclusory, "the ambiguity must be resolved against the insurer which drafted the contract" (*State of New York v Home Indem. Co.*, 66 NY2d 669, 671 [1985]).

Accordingly, the order should be affirmed to the extent it granted plaintiff's motion for partial summary judgment.

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

ENTERED: DECEMBER 15, 2009



Tom, J.P., Saxe, Renwick, DeGrasse, Richter, JJ.

1403 Evangelia Manios Zachariou, Index 601196/06
Plaintiff-Respondent,

-against-

Vassilios Manios,
Defendant-Appellant.

Watson, Farley & William LLP, New York (John Kissane of counsel), for appellant.

Hughes Hubbard & Reed LLP, New York (Derek J.T. Adler of counsel), for respondent.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered April 7, 2009, which denied defendant's motion to permanently stay an arbitration commenced by plaintiff in New York, unanimously affirmed, without costs.

Whether a dispute is arbitrable is generally an issue for the court to decide unless the parties clearly and unmistakably provide otherwise *(Matter of Smith Barney Shearson v Sacharow*, 91 NY2d 39, 45-46 [1997]). Where there is a broad arbitration clause and the parties' agreement specifically incorporates by reference the AAA rules providing that the arbitration panel shall have the power to rule on its own jurisdiction, courts will "leave the question of arbitrability to the arbitrators" *(Life Receivables Trust v Goshawk Syndicate 102 at Lloyd's*, ___ AD3d ___, 2009 NY Slip Op 07322, *1 [2009] [quoting *Smith Barney Shearson, supra*]). Here, however, since the parties' agreement

contains a narrow arbitration provision, the reference to the AAA rules does not constitute clear and unmistakable evidence that they intended to have an arbitrator decide arbitrability. Thus, that question is for the court to decide in the first instance (*see e.g. Burlington Resources Oil & Gas Co. LP v San Juan Basin Royalty Trust*, 249 SW3d 34, 40-42 [Tex 2007]; *James & Jackson, LLC v Willie Gary, LLC*, 906 A2d 76, 81 [Del 2006]; *see also Katz v Feinberg*, 290 F3d 95, 97 [2d Cir 2002]). *Contec Corp. v Remote Solution Co., Ltd.* (398 F3d 205 [2d Cir 2005]), relied upon by plaintiff, is distinguishable since the contract there contained a broad arbitration clause.

When reviewing a narrow arbitration clause, the court must determine whether the subject of the parties' dispute is on its face within the purview of the clause or is a collateral matter connected to the main contract (*Gerling Global Reins. Corp. v Home Ins. Co.*, 302 AD2d 118, 126 [2002], *lv denied* 99 NY2d 511 [2003]). Paragraph 10 of the parties' U.S. Agreement provides that an arbitrator will decide the limited issue of "the amount of the Decana Distribution, the Prestige Distribution, the Texas Distributions and/or the Party Distribution." In an earlier appeal from a decision on defendant's motion to compel arbitration, this Court found that such a compensatory damages claim was to be determined by the arbitrator (*Zachariou v Manios*, 50 AD3d 257 [2008]). Read as a whole, plaintiff's notice of

arbitration and statement of claim seeks a determination of the amount of the same distributions. The arbitration notice contains a lengthy statement of facts outlining the history of the parties' dispute, but plaintiff does not specifically seek arbitration of the collateral matters mentioned therein. Since the subject matter of the dispute falls within the purview of the arbitration clause, the motion court correctly denied a stay.

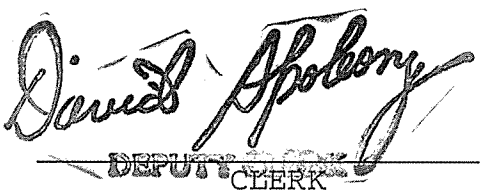
Although some of the relief requested in the arbitration, including specific performance and an accounting, appears to fall outside the narrow arbitration clause, that alone is not a basis to stay the arbitration. "An application for a stay will not be granted . . . even though the relief sought is broader than the arbitrator can grant, if the fashioning of some relief on the issue sought to be arbitrated remains within the arbitrator's power" (*Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 309 [1984]). Defendant has failed to show that the matter sought to be arbitrated is beyond the arbitrator's power to grant some relief. We cannot assume in advance that the arbitrator will exceed his powers as delineated in the parties' narrow arbitration provision (*see Board of Educ. of Lakeland Cent. School Dist. of Shrub Oak v Barni*, 49 NY2d 311, 315 [1980]), and in the event the arbitrator does so, the arbitration award will be subject to vacatur (*see* CPLR 7511[b][1][iii]; *Silverman, supra*).

Plaintiff's pursuit of related but legally distinct claims in this and other litigation did not constitute a waiver of her right to arbitrate the amount of the various distributions due the parties (*see Serino v Lipper*, 55 AD3d 472, 273 [2008]), particularly in light of the fact that defendant previously moved to compel arbitration.

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

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

ENTERED: DECEMBER 15, 2009



DEPUTY CLERK

Tom, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

1593 Maria Rollins, Index 108311/04
Plaintiff-Respondent,

-against-

New York City Board of Education,
Defendant-Appellant.

Michael A. Cardozo, Corporation Counsel, New York (Pamela Seider Dolgow of counsel), for appellant.

Richard L. Giampa, Bronx, for respondent.

Order, Supreme Court, New York County (Eileen A. Rakower), entered on or about August 27, 2008, which denied defendant's motion for summary judgment and granted plaintiff's cross motion for leave to amend the complaint, unanimously reversed, on the law, without costs, the cross motion denied, the motion granted, and the complaint dismissed. The Clerk is directed to enter judgment in favor of defendant.

Plaintiff, a school safety officer, had to show a special relationship in order to state a claim for negligent failure to protect her from injury caused by a student (*see Dinardo v City of New* York, __ NY3d __, 2009 NY Slip Op 8853 [2009]; Cuffy *v New York*, 69 NY2d 255, 261 [1987]). Since she raised neither that legal theory nor the factual predicate -- an alleged oral promise and policy with the special education dean -- in her notice of claim or her complaint, she could not assert that theory or the facts underlying it for the first time in opposition to the

motion for summary judgment (*see Brown v New York City Tr. Auth.*, 172 AD2d 178, 180-181 [1991]). Furthermore, plaintiff's affidavit in opposition was fundamentally and irreconcilably inconsistent with her deposition testimony (*see Fernandez v VLA Realty, LLC*, 45 AD3d 391 [2007]).

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

ENTERED: DECEMBER 15, 2009

DEPUTY CLERK

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

1746 The People of the State of New York, Ind. 5187/04
Respondent,

-against-

James Phillips,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered January 31, 2007, convicting defendant, after a jury trial, of attempted murder in the second degree, assault in the first degree, aggravated criminal contempt (2 counts), criminal contempt in the first degree (2 counts), criminal possession of a weapon in the third degree (two counts) and menacing in the third degree, and sentencing him to an aggregate term of 16 years, unanimously affirmed.

After an extensive and thorough hearing, the court properly found that the brain injury defendant sustained as the result of a stroke did not render him incompetent to stand trial. The evidence established that defendant was able to "consult with his lawyer with a reasonable degree of rational understanding," and had a "rational as well as factual understanding of the proceedings against him" (*People v Francabandera*, 33 NY2d 429,

436 [1974]). There is no basis for disturbing the court's weighing of conflicting expert testimony. Among other things, the court properly concluded that the principal defense expert relied heavily on standardized tests that were of limited value in a determination of legal competency, that the testimony of a psychologist called by the People was very significant because of her extended contact with defendant, that defendant's conduct and testimony at the competency hearing further demonstrated his capacity to stand trial, and that a series of special accommodations would minimize the effect of defendant's medical condition on his ability to assist in his defense.

The court properly denied defendant's motion to suppress his postarrest statement. Defendant's condition did not cast any doubt on his ability to understand the *Miranda* warnings and voluntarily waive his rights (see *People v Williams*, 62 NY2d 285, [1984]).

We perceive no basis for reducing the sentence.

We have considered and rejected defendant's remaining claims.

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

ENTERED: DECEMBER 15, 2009

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

1748 In re Freddy G.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

Tamara A. Steckler, The Legal Aid Society, New York (Louise Feld of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for presentment agency.

Order of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about September 18, 2008, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crimes of robbery in the third degree, grand larceny in the fourth degree, criminal possession of stolen property in the fifth degree, and menacing in the third degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's fact-finding determination 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 court's determinations concerning credibility and identification. The victim's

testimony established that he had a sufficient opportunity to observe appellant at the time of the robbery, and that he was able to recognize him when he encountered him several weeks later.

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

ENTERED: DECEMBER 15, 2009

CLERK

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

1750 Jerome Wilkes, Index 15231/07
Plaintiff-Appellant,

-against-

YMCA of Greater New York, et al.,
Defendants-Respondents.

Kenneth J. Gorman, New York, for appellant.

Gordon & Silber, P.C., New York (William L. Hahn of counsel), for respondent.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered February 11, 2009, which granted defendants' motion for summary judgment, unanimously affirmed, without costs.

Defendants made a prima facie showing of entitlement to judgment based on the doctrine of primary assumption of the risk by demonstrating that the risk of colliding with the wall was inherent in the activity, and the condition of the wall was open and obvious (*Ribaudo v La Salle Inst.*, 45 AD3d 556 [2007], *lv denied* 10 NY3d 717 [2008]). Any difference between the wall and the out-of-bounds line was "perfectly obvious" (*McKey v City of New York*, 234 AD2d 114, 115 [1996]). There was no evidence that defendants had notice of any allegedly wet condition on the basketball court (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [2008]).

The affidavit of the plaintiff's expert, who opined that defendants were negligent for failing to pad the wall behind the

basket, given the proximity of the wall to the out-of-bounds line, was insufficient to raise a triable issue of fact, since the expert failed to identify any specific industry standard relied upon in reaching her opinion (*see Musante v Oceanside Union Free School Dist.*, 63 AD3d 806, 808 [2009], *lv denied* 13 NY3d 704 [2009]; *Hotaling v City of New York*, 55 AD3d 396 [2008], *affd* 12 NY3d 862 [2009]; *cf. Greenburg v Peekskill City School Dist.*, 255 AD2d 487 [1998]).

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

ENTERED: DECEMBER 15, 2009

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

1751 The People of the State of New York, Ind. 6934/03
Respondent,

-against-

William Rodriguez,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Proskauer Rose LLP, New York (Jed W. Friedman of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Olivia Sohmer of counsel), for respondent.

Order, Supreme Court, New York County (William A. Wetzel, J.), entered on or about April 7, 2009, which denied defendant's motion to be resentenced under the 2005 Drug Law Reform Act (L 2005, ch 643), unanimously affirmed.

The court properly exercised its discretion in determining that substantial justice dictated the denial of the application. Defendant's extensive criminal record, the seriousness of the underlying crime, and defendant's illegal reentry into the United States and resumption of drug trafficking almost immediately after being released from custody on a prior class A-II felony drug conviction and deported outweighed any positive aspects of

defendant's prison record and post-release prospects (*see People v Pena*, 55 AD3d 393 [2008]).

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

ENTERED: DECEMBER 15, 2009

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

1752 Urve Mollerson Grad, etc., Index 304638/08
Plaintiff-Respondent,

-against-

Silvia Hafliger, M.D.,
Defendant-Appellant,

Mauli Desai, M.D., et al.,
Defendants.

Callan, Koster, Brady & Brennan LLP, New York (Michael P. Kandler of counsel), for appellant.

Shayne, Dachs, Corker, Sauer & Dachs, LLP, Mineola (Jonathan A. Dachs of counsel), for respondent.

Order, Supreme Court, Bronx County (Cynthia S. Kern, J.), entered on or about June 10, 2009, which granted plaintiff's motion to file a late notice of medical malpractice action and denied defendant Hafliger's cross motion to dismiss the complaint for failure to include a certificate of merit, unanimously affirmed, without costs.

Service of the summons and complaint in June 2008 was not accompanied by the required notice of medical malpractice action (CPLR 3406) and an attorney's certificate of merit (CPLR 3012-a). Instead, plaintiff's counsel certified that he had insufficient time to obtain a consultation with a doctor. In February 2009, plaintiff moved for leave to file a late notice, based on a "clerical error" by counsel. Hafliger opposed the motion and cross-moved to dismiss the complaint for failure to file a

certificate within 90 days of the filing of the complaint.

The court may extend the time to file the notice, upon the showing of good cause (CPLR 2004). Plaintiff's failure to file a timely notice does not warrant the harsh sanction of dismissal (*Tewari v Tsoutsouras*, 75 NY2d 1, 8 [1989]). Plaintiff made the requisite showing of good cause based on law office failure (*see Tak Kuen Nagi v Sze Jing Chan*, 159 AD2d 278 [1990]).

To avoid dismissal for neglecting to serve a certificate with the pleadings, the plaintiff must present a reasonable excuse for failure to comply with the statute and an affidavit of merit from a medical expert (*George v St. John's Riverside Hosp.*, 162 AD2d 140 [1990]). In opposition to Hafliger's cross motion, plaintiff provided a sufficient affirmation of a doctor attesting to the merits of the case and an affirmation of counsel setting forth a reasonable excuse for failure to comply with the statute. The fact that the doctor's name was redacted from the affirmation served on defense counsel is insignificant because it was included in the original provided to the court (*see Marano v Mercy Hosp.*, 241 AD2d 48, 50 [1998]).

We have reviewed the remaining issues raised by the parties and find them unavailing.

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

ENTERED: DECEMBER 15, 2009

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

1753 In re Rosana R.,
Petitioner-Appellant,

-against-

James M.,
Respondent-Respondent.

Howard M. Simms, New York, for appellant.

Order, Family Court, New York County (Maureen McLeod, J.), entered on or about March 31, 2008, which denied petitioner's objections to the October 16, 2007 order of the Support Magistrate, dismissing her petition that sought to modify a prior order of child support to the extent of annulling the amount owed in arrears, unanimously affirmed, without costs.

The petition was properly dismissed, since Family Ct Act § 451 precludes the court from "reduc[ing] or annul[ing] child support arrears accrued prior to the making of an application pursuant to this section" (*see Matter of Dox v Tynon*, 90 NY2d 166, 173 [1997]; *Matter of Zaid S. v Yolanda N.A.A.*, 24 AD3d 118 [2005]). Here, petitioner's child support arrears were set and reduced to a money judgment in 2005, and the subject petition was brought in 2007.

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

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

ENTERED: DECEMBER 15, 2009

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

1755 The People of the State of New York, Ind. 6255/06
Respondent,

-against-

Jamel Bell,
Defendant-Appellant.

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

Jamel Bell, appellant pro se.

Robert M. Morgenthau, District Attorney, New York (Sheryl Feldman of counsel), for respondent.

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered September 17, 2007, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 16 years to life, unanimously affirmed.

Defendant's challenges to the prosecutor's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find that the challenged remarks were generally responsive to the defense summation, and that while some comments were ill-phrased, they were not so egregious as to deprive defendant of a fair trial (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

Defendant's challenge to the constitutionality of his adjudication as a persistent violent felony offender is without merit (*see Almendarez-Torres v United States*, 523 US 224 [1998]; *People v Leon*, 10 NY3d 122, 126 [2008], *cert denied* 554 US __, 128 S Ct 2976 [2008]).

We have considered and rejected defendant's ineffective assistance of counsel claims, including those related to the absence of objections to the prosecutor's summation and those contained in defendant's pro se supplemental brief (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: DECEMBER 15, 2009

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

1756 The People of the State of New York, Ind. 855/08
Respondent,

-against-

Uzo Uzo, etc.,
Defendant-Appellant.

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

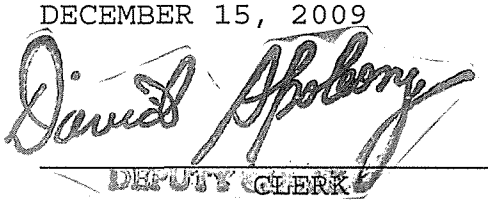
Robert M. Morgenthau, District Attorney, New York (Mary S. Barton of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Robert Stolz, J.), rendered on or about September 17, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTERED: DECEMBER 15, 2009



DEPUTY CLERK

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

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

1759 Harriet Beizer, Index 104961/08
Plaintiff-Appellant,

-against-

John M. Ioannou, et al.,
Defendants-Respondents.

Victor M. Serby, Woodmere, for appellant.

Devereaux Baumgarten, New York (Sidney Baumgarten of counsel), for respondents.

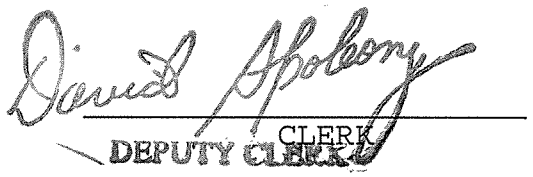
Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered February 27, 2009, which, in an action for treble damages under New York City Civil Court Act § 1812 based on seven Small Claims default judgments in favor of plaintiff and against defendants, denied plaintiff's motion for summary judgment and, sua sponte, dismissed the complaint with leave to commence a new action for the same relief in Civil Court, unanimously modified, on the law, to vacate the dismissal and reinstate the complaint, the matter transferred to Civil Court, and otherwise affirmed, without costs.

While actions under CCA 1812 should be brought in Civil Court where, as here, each of the constituent Small Claims judgments is for less than $25,000 inclusive of interest, costs and disbursements, and thus within Civil Court's monetary jurisdiction (*see* CCA § 211), it does not follow that if such an action is brought in Supreme Court it should be dismissed.

Rather the availability of complete relief in Civil Court warrants a transfer of the action to that court (*see 91st St. Co. v Robinson*, 242 AD2d 502 [1997]; *see also* NY Const art VI, §§ 7[b], 19[a]). Like Supreme Court, we have not considered the merits of plaintiff's motion for summary judgment.

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

ENTERED: DECEMBER 15, 2009



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

1760 Stonebridge Capital, LLC, Index 602081/08
Plaintiff-Appellant,

-against-

Nomura International PLC,
Defendant-Respondent,

U.S. Bank National Association, et al.,
Defendants.
- - - - -
Nomura International PLC,
Counterclaim Plaintiff-Respondent,

-against-

Stonebridge Capital, LLC, et al.,
Counterclaim Defendants,

J.R. 1042 Investor, LLC, et al.,
Counterclaim Defendants-Appellants.

Duane Morris LLP, Atlanta, GA (Robert E. Lesser of counsel), for Stonebridge Capital, LLC, appellant.

Morrison Cohen LLP, New York (Jerome Tarnoff of counsel), for counterclaim appellants.

Shearman & Sterling LLP, New York (Brian H. Polovoy of counsel), for respondent.

Order, Supreme Court, New York County (Bernard Fried, J.), entered July 7, 2009, which granted the motion of defendant Nomura International PLC to dismiss the amended verified complaint pursuant to CPLR 3211(a)(1) and (7) and declared that Nomura has the right to declare a default under the subject indentures, unanimously affirmed, with costs.

In September 2007, the parties entered into a complex

transaction styled as a "loan." Each of the counterclaim defendant 1042 Investor LLCs (collectively the 1042 Investors) sold a portion of its business to its employees through an employee stock ownership plan and invested the proceeds of the sale in public utility bonds in order to obtain tax benefits. The bonds were insured against default by certain financial guaranty insurers.

The bonds were then used to collateralize loans that the 1042 Investors obtained in the subject loan transaction. Plaintiff Stonebridge, as sponsor, made loans to the 1042 Investors and received as collateral the bonds that the 1042 Investors had purchased. Stonebridge then securitized these loans by issuing SEC-registered notes to Nomura.

At issue on appeal are clauses in the transaction documents which entitled Nomura to (1) an increased rate of interest on the notes if the Moody's and S&P ratings for the bonds fell below a certain level (the "downgrade yield trigger") (§ 3.3 of the Stonebridge Indenture) and (2) Nomura's right to declare a default, accelerating the due date for payment on the notes, if the ratings fell even further (§ 6.1[a][ii] of the Stonebridge Indenture and § 6.1[a][v] of the Investor Indentures).

On July 9, 2008, Nomura declared Stonebridge in default because the rating of XL Capital's financial guaranty insurance policy on the bonds had fallen below the default trigger level.

Nomura also claimed higher interest based on the triggering of a downgrade yield.

Stonebridge brought this action for a declaration that it is not in default (3rd cause of action), for reformation of the subject clauses and to restrain the collateral trustees from acting on Nomura's instructions regarding default. It alleged scrivener's error by its own drafter (1st cause of action) or mutual mistake (2nd) in making the triggers dependent on ratings of the "financial guaranty insurance policy related to the underlying bond", instead of ratings of the "underlying bond," which it claimed the parties had negotiated and had agreed to all along, and that Nomura had acknowledged the mistake and stated that it planned to correct it.

Stonebridge also alleged that, based upon what it considers the operative language of the default clause, since the credit rating agencies do not rate the "policy" but do rate the insurers, the trigger set forth in the documents can never occur so it could not have reflected the actual agreement.

Nomura counterclaimed, as herein relevant, that a downgrade yield and an event of default had been triggered.

The allegations of scrivener's error and mutual mistake were properly dismissed. Stonebridge's allegations failed to meet the "heavy presumption that a deliberately prepared and executed written instrument manifest[s] the true intention of the parties"

(*George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 219 [1978]). Since the parties did not agree among themselves with respect to the meaning of the disputed language, the court properly found that reformation on the basis of scrivener's error was unavailable (*see Nash v Kornblum*, 12 NY2d 42, 47 [1962]; *Rosalie Estates v Colonia Ins. Co.*, 227 AD2d 335, 337 [1996]).

The mutual mistake claim was also properly dismissed as Stonebridge failed to allege that the parties reached an agreement that was not reflected in the transaction documents, failed to state "exactly" what such agreement was, and thus failed to overcome the strong presumption against mutual mistake claims (*see Harris v Uhlendorf*, 24 NY2d 463, 467 [1969]; *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 29 [1992], *lv denied in part, appeal dismissed in part* 80 NY2d 1005 [1992]).

The court properly ruled upon the declaratory judgment claim as a matter of law, finding that the declaration sought by Stonebridge would not only render several sections of the indentures meaningless, but would deny Nomura any possibility of ever declaring an event of default, leaving the default provision without any force and effect (*see Acme Supply Co., Ltd. v City of New York*, 39 AD3d 331, 332 [2007], *lv denied* 12 NY3d 701 [2009]). To "avoid an interpretation that would leave contractual clauses meaningless" (*150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 6 [2004] [internal quotation marks and citation omitted]), the

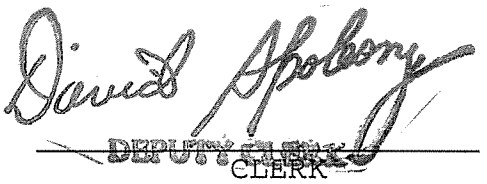
court harmonized the unambiguous language of the indentures in conjunction with the language in a contemporaneous tax opinion (*see Matter of Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 [2003]), finding that the disputed language related to the rating of the issuer of the financial guaranty insurance policy, which was the position espoused by Nomura.

Stonebridge's remaining claims (for trade libel, equitable estoppel, and breach of the implied contract of good faith and fair dealing) were properly dismissed as suffering from grave pleading deficiencies.

We have considered the remaining arguments, including the 1042 Investors' procedural claims, and find them unavailing.

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

ENTERED: DECEMBER 15, 2009



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

1761 The People of the State of New York, Ind. 90054/05
Respondent,

-against-

Latisha Lindsay,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Justin J. Braun of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered January 8, 2008, convicting defendant, after a jury trial, of burglary in the first degree, and sentencing her to a term of 15 years, unanimously affirmed.

The challenged portion of the court's response to a note from the deliberating jury indicating an inability to agree on a verdict was not prejudicial (*see generally People v Agosto*, 73 NY2d 963, 966-967 [1989]). The court's statement that the jury could start "at the bottom," and that it could begin, "for instance," with the relatively simple issue of whether defendant entered the premises where the crime occurred, did not suggest that defendant was at least guilty of burglary even if she was not guilty of the homicide charges also submitted, or imply that entry is the only element of burglary. There is no reasonable possibility that the jurors could have been misled along these

lines.

Defendant did not preserve his challenge to the court's response to another note inquiring about the ramifications with respect to evidence of defendant's statements if it disbelieved the investigating detective's testimony, and we decline to review it in the interest of justice. As an alternative holding, we likewise find that the response was not prejudicial. When read together with the court's main charge on voluntariness of statements, the response gave the jury appropriate guidance. We also reject defendant's argument that her attorney rendered ineffective assistance by failing to except to this supplemental instruction.

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

ENTERED: DECEMBER 15, 2009

DEPUTY CLERK

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

1762 Anthony Gordon, et al., Index 112926/07
Plaintiffs-Appellants,

-against-

Chris Curtis,
Defendant-Respondent,

Laurence Toussaint-Curtis, et al.,
Defendants.

Law Offices of Fred L. Seeman, New York (Fred L. Seeman of counsel), for appellants.

Braverman & Associates, P.C., New York (Tracy M. Peterson of counsel), for respondent.

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered July 14, 2008, which granted defendants' motion to dismiss the complaint, unanimously affirmed, with costs.

Plaintiff's fraud cause of action is barred by the statute of limitations. Plaintiffs claim that they did not discover the alleged fraud until late 2006 or early 2007 and could not with reasonable diligence have discovered it sooner (*see* CPLR 213[8]). However, only a few months after their application to purchase a cooperative apartment was rejected, in 1998, plaintiffs were approved for the purchase of another apartment in the building. Although this sequence of events should fairly have aroused their suspicion, plaintiffs, who as shareholders in the cooperative were in a position to try to discover the reason for the rejection, apparently made no such effort in the nine years

between that rejection and the return of the original apartment to the market in 2007 (*see Higgins v Crouse*, 147 NY 411, 415-416 [1895]).

The statute of limitations is not tolled by application of the doctrine of equitable estoppel, since, although plaintiffs complain about the perfunctory nature of the minutes of the Board meeting at which their original application was rejected, they do not allege that they relied on those minutes to their detriment (*see Solow Mgt. Corp. v Arista Records, Inc.*, 41 AD3d 219 [2007]). Indeed, plaintiffs did not inspect the minutes until 2007. Nor was the statute of limitations tolled by defendant Curtis's absence from the state, since the court could have obtained jurisdiction over the non-domiciliary Curtis under the long-arm statute, based on his ownership, use or possession of the cooperative apartment (*see* CPLR 207[3]; 302[a][4]; *Matter of State Tax Commn. v Shor*, 43 NY2d 151, 154 [1977]; *Marie v Altshuler*, 30 AD3d 271, 272 [2006]).

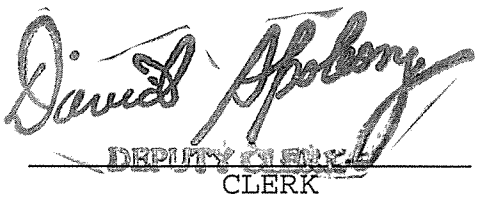
In any event, the complaint fails to state a cause of action. The breach of contract cause of action does not identify the express provision that defendants allegedly breached (*see 767 Third Ave. LLC v Greble & Finger, LLP*, 8 AD3d 75, 75 [2004]), and the allegations of the fraud cause of action are insufficiently specific (*see id.* at 75-76).

We have considered plaintiffs' remaining arguments and find them unavailing.

We decline to award sanctions against plaintiffs for pursuing this appeal.

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

ENTERED: DECEMBER 15, 2009



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

1763 In re Cynthia Lowney, Index 108754/07
Petitioner-Appellant,

-against-

New York State Division of Human Rights,
Respondent,

New York State Department of Labor
(Unemployment Insurance Appeal Board),
Respondent-Respondent.

Cynthia Lowney, appellant pro se.

McNamee, Lochner, Titus & Williams, P.C., Albany (Scott C. Paton of counsel), for New York State Department of Labor, respondent.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered October 10, 2007, which granted respondents' motion to dismiss the petition for lack of personal jurisdiction, and found petitioner's motions for consolidation with an Albany County proceeding and a change of venue from Albany County to New York County to be moot, unanimously affirmed, without costs.

Pursuant to CPLR 307(2), personal service upon a state officer sued in an official capacity or upon a state agency, "which shall be required to obtain personal jurisdiction", must either be by delivery to the chief executive officer (here the Commissioner) or to a person or persons designated by such chief executive officer, or by certified mail. It is uncontested that service here was not performed by certified mail. Service to a

secretary, as occurred here, did not provide the court with personal jurisdiction over the agency or Commissioner, and required dismissal of the proceeding, as the Department of Labor was a necessary party (*see Rego Park Nursing Home v State of N.Y., Dept. of Health/Bur. of Residential Care Facility Reimbursement*, 160 AD2d 923, 924 [1990], *affd* 77 NY2d 942 [1991]; *Matter of Wittie v State of N.Y. Off. Of Children & Family Servs.*, 55 AD3d 842, 843 [2008]). That the Commissioner ultimately received actual notice of the proceeding does not provide jurisdiction to the court (*see Macchia v Russo*, 67 NY2d 592, 595 [1986]; *Moogan v New York State Dept. of Health*, 8 AD3d 68, 69 [2004], *lv denied* 3 NY3d 612 [2004]). Nor has plaintiff provided any facts from which it may be found that the agency acted wrongfully or negligently causing petitioner to change her position to her detriment, to support her estoppel argument (*see Berkowitz by Berkowitz v New York City Bd. of Educ.*, 921 F Supp 963, 968 [ED NY 1996]; *Bender v New York City Health & Hosps. Corp.*, 38 NY2d 662, 668 [1976]; *Francis v State of N.Y.*, 155 Misc 2d 1006, 1012 [Ct Cl 1992]). At no time did petitioner seek to serve any properly authorized person, nor does petitioner or her process server aver that either of them was told that the secretary to whom they gave the papers was authorized, as required by statute, to accept process commencing a proceeding.

Petitioner's consolidation and change of venue issues are, therefore, moot.

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

ENTERED: DECEMBER 15, 2009

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

1764-
1765N Golden Gate Yacht Club, Index 602446/07
Plaintiff-Respondent,

-against-

Société Nautique De Geneve,
Defendant-Appellant,

Club Nautico Espanol De Vela
Intervenor-Defendant.

- - - - -

Emirates of Ras Al Khaimah,
Amicus Curiae.

Sullivan & Cromwell LLP, New York (Robert J. Giuffra, Jr. of counsel), for appellant.

Boies, Schiller & Flexner LLP, Armonk (David Boies of counsel), for respondent.

Cleary Gottlieb Steen & Hamilton LLP, New York (Jeffrey A. Rosenthal of counsel), for amicus curiae.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered October 30, 2009, which granted plaintiff Golden Gate Yacht Club's (GGYC) motion for an order declaring invalid Societe Nautique De Geneva's (SNG) selection of Ras Al Khaimah, United Arab Emirates (RAK) as the venue for the 33rd America's Cup yacht race, unanimously affirmed, without costs. Order, same court and Justice, entered November 4, 2009, which, inter alia, ruled that, under the Deed of Gift governing the race, a yacht's "rudders" may not be included in measuring its length on load water-line, unanimously affirmed, without costs.

Concerning the October 30, 2009 order, by order filed April 7, 2009 (*Golden Gate Yacht Club v Societe Nautique de Geneve*, 12 NY3d 248 [2009]), the Court of Appeals reinstated a May 12, 2008 order of Supreme Court which provided, insofar as pertinent, that (1) "the location of the match shall be in Valencia, Spain or any other location selected by SNG [or agreed to by the parties], provided SNG notify GGYC in writing not less than six months in advance of the date set for the first challenge match race of the location it has selected for the challenge match races," and (2) that the date of the first race "shall be the date ten calendar months from the date of service of a copy of this order, with notice of entry, upon the attorneys who have appeared herein," or such other date as might be agreed to by the parties (2008 NY Slip Op 32296[U], *4-5 [May 12, 2008, Cahn, J.]). Also pertinent is the Deed's requirement that races be conducted between May 1 and November 1 if in the Northern Hemisphere and between November 1 and May 1 if in the Southern Hemisphere. Measuring 10 months from the Court of Appeals' April 7, 2009 order, the first race would have to be conducted on February 8, 2010. Nevertheless, on April 23, 2009, SNG informed GGYC that the first race was to conducted on May 3, 2010, and that SNG would notify GGYC before December 3, 2009 of a Northern Hemisphere venue. GGYC moved to hold SNG in contempt, arguing that, by virtue of the April 7, 2009 order, the first race had to be conducted on February 8,

2010, and that SNG had to notify GGYC of the location of the races no later than August 8, 2009. SNG responded that it set the date in May, rather than February, because GGYC's Notice of Challenge expressly put forth a Northern Hemisphere challenge and, under the Deed, a Northern Hemisphere race could not take place earlier than May. On May 14, 2009, the court directed SNG to hold the races in February 2010, "as per the order of the Court of Appeals." On August 5, 2009, SNG announced the selection of RAK, which is in the Northern Hemisphere, as the venue of the races. GGYC again objected, arguing that, by virtue of the April 7, 2009 order, and notwithstanding the Deed's requirement that a February race be conducted in the Southern Hemisphere, the races had to be conducted in Valencia, Spain, which is in the Northern Hemisphere, in February 2010, absent agreement otherwise between the parties or SNG's selection of an alternative Deed-compliant location by August 8, 2009. The motion court correctly rejected SNG's selection of RAK. The April 7, 2009 order of the Court of Appeals does not explicitly state that it intended to remove entirely the Deed's hemisphere requirements, or otherwise indicate, as SNG argues, that it was a compromise between GGYC's claimed right to have the race conducted as soon as 10 months after issuance of the order and SNG's claimed right to select a Northern Hemisphere venue. Accordingly, the order should be read as carving out an exception

to the Deed's hemisphere requirements in the case of Valencia, and the phrase "or any other location selected by SNG" should be read as "or any other Deed-compliant location selected by SNG." RAK, which is in the Northern Hemisphere, is not a Deed-compliant location for a February race.

Concerning the November 4, 2009 order on appeal, the court correctly found, based on extrinsic evidence, that the Deed excludes rudders for the purpose of measuring the length on load water-line. The Deed, which provides, in relevant part, that the competing vessels, "if single-masted, must measure between 44 and 90 feet on the load water-line," and states that neither the "center-board" nor "sliding keel" shall be considered part of the vessel for any purposes of measurement, but does not define "load water-line," which is clearly a term of art with specialized meaning in the sport of sailing, is ambiguous as to whether rudders should be considered in measuring the length on load water-line. The mere fact that the Deed expressly only states that the center-board and sliding keel shall not be considered in the measurement does not necessarily mean that all other parts of the vessel, including the rudders, were intended to be considered in making that measurement. Given this ambiguity, the court properly relied on undisputed extrinsic evidence, including New York Yacht Club rules extant at the time the 1887 Deed was settled, showing that length on load water-line is typically

measured "exclusive of any portion of the rudder or rudder-stock."

We have considered the remaining contentions and find them unavailing.

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

ENTERED: DECEMBER 15, 2009

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

1766N Dennis Lee also known as Lee Man for Dennis, Plaintiff-Respondent, Index 603111/05

Li-Mun-Hok Steven, etc., et al., Plaintiffs,

-against-

Nancy Lee Luk also known as Lee Lai Ching, Defendant-Appellant,

Nancy, et al., Defendants.

Heller, Horowitz & Feit, P.C., New York (Allen M. Eisenberg of counsel), for appellant.

D'Arcambal, Levine & Ousley, LLP, New York (Aimee P. Levine of counsel), for respondent.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered April 23, 2009, which granted plaintiff Dennis Lee's motion to compel defendant Nancy Lee Luk to respond to interrogatories 2, 12, 17 and 19 and document requests 7, 8, 14, 22, and 37, in part, unanimously modified, on the law and the facts, to limit disclosure to the period from August 30, 1999 through the present and to strike document request 22, and, as so modified, affirmed, without costs.

The trial court properly directed Luk to provide financial information and documentation, since the financial disclosure does not relate solely to the accounting claims but is relevant

and material to the other causes of action asserted in the amended complaint, including those for breach of fiduciary duty and conversion (*see A. Colish, Inc. v Abramson*, 150 AD2d 210, 211 [1989]).

Plaintiff's claims were limited by the court's prior order finding that plaintiff could recover "money damages from [Luk] for her acts going back to August 30, 1999." Thus, information regarding Luk's acts before August 30, 1999 is not "material and necessary in the prosecution ... of [the] action" (CPLR 3101; *see Nasco, N. Atl. Steel Co. v Da Silva*, 167 AD2d 149 [1990]; *Matos v City of New York*, 78 AD2d 834 [1980]).

Document request 22 is an improper "all-inclusive demand for documents of any and every kind" (*Brandon v Chefetz*, 101 AD2d 786 [1984]).

We have considered defendants' remaining arguments and find them unavailing.

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

ENTERED: DECEMBER 15, 2009

CLERK

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

1767 In re Martin Hodge,
[M—4982] Petitioner,

-against-

Hon. Clark V. Richardson, etc.,
Respondent.

Martin Hodge, petitioner pro se.

Michael Colodner, New York (John Eiseman of counsel), for respondent.

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: DECEMBER 15, 2009

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
Eugene Nardelli
John T. Buckley
Rolando T. Acosta
Helen E. Freedman, JJ.

1157
Index 601077/07

Asher B. Edelman, et al.,
Plaintiffs-Appellants,

-against-

Starwood Capital Group, LLC, et al.,
Defendants-Respondents.

Plaintiffs appeal from an order of the Supreme Court, New York County (Eileen Bransten, J.), entered July 3, 2008, which granted defendants' motion to dismiss the amended complaint.

Meier Franzino & Scher, LLP, New York (Frank J. Franzino, Jr. and Davida S. Scher of counsel), for appellants.

Dechert LLP, New York (Steven B. Feirson, of the State of Pennsylvania Bar admitted pro hac vice, Michael J. Gilbert and James S. Buino of counsel), for Starwood Capital Group, LLC and Star GT Acquisition, Fred L. Seeman, respondents.

Cahill Gordon & Reindel LLP, New York (Andrea R. Butler, Charles A. Gilman and Ilana Ehrlich of counsel), for Starwood Hotels & Resorts Worldwide, Inc., respondent.

FREEDMAN, J.

This action arises from the unsuccessful attempt in 1999 by plaintiff Asher B. Edelman, an investor and financier, to acquire the French company Societe du Louvre (SDL), whose primary assets included hotel chains, real estate, and luxury goods businesses. Edelman avers that he conducted extensive research to identify SDL as a company whose restructuring would benefit its shareholders. Defendant Starwood Capital succeeded in acquiring SDL in 2005, and plaintiffs' central claim is that defendants wrongfully obtained and profited from information about SDL that Edelman had compiled and from his strategic plan to acquire the company through a tender offer and then realize a profit by selling off some of its holdings while retaining and restructuring others.

The amended complaint asserts claims for unfair competition, improper use of proprietary information, and unjust enrichment. The motion court granted defendants' motion pursuant to CPLR 3211(a)(7) to dismiss the complaint in its entirety for failure to state a cause of action, and we affirm.

The amended complaint alleges that in 1997, Edelman and his associates began researching and analyzing the finances, ownership structure and business operations of SDL. After concluding that the value of SDL's underlying assets exceeded the

company's total stock price, on or about September 1999, Edelman retained ODDO et Cie., a French company, to arrange financing for a tender offer for SDL and obtain a business partner for SDL's hotel business, which Edelman intended to retain after the acquisition. Edelman and ODDO executed a written contract with a provision under which ODDO acknowledged "the need for confidentiality," and Edelman allegedly orally instructed ODDO to mark any documents given to a potential business partner as "confidential." On Edelman's behalf, ODDO solicited defendant Starwood Resorts as a potential hotel business partner. Through ODDO, acting as Edelman's agent, Edelman allegedly insisted, and Starwood Resorts allegedly orally agreed, that it would keep the proprietary information and the business plan that Edelman provided confidential and review them solely to determine whether it would join Edelman as a partner for the SDL acquisition. After reviewing the research and plan, Starwood Resorts declined to join the venture.

The complaint further alleges that Edelman abandoned his plan to acquire SDL after he was thwarted repeatedly by the prominent Taittinger family, which directly and indirectly controlled SDL. In 2005, however, the Tattinger family sold their holdings in SDL at public auction. The successful bidder was Starwood Capital, which created defendant Star GT Acquisition

as a corporate vehicle for purchasing the assets. At that time, Edelman did not bid at the auction or otherwise seek to acquire SDL.

Plaintiffs allege that Starwood Capital's postacquisition plans for SDL, which it submitted both to the press and to SDL's shareholders, matched Edelman's strategic business plan from 1999. Plaintiffs claim that Starwood Resorts improperly shared the proprietary information and plan that ODDO had divulged to it with Starwood Capital, which used them to its business advantage.

As a threshold matter, plaintiffs' appeal from the dismissal of their unfair competition claim is not before this Court because they did not address the issue in their brief (*see McHale v Anthony*, 41 AD3d 265, 266-267 [2007]). In any event, plaintiffs failed to plead the required element of the claim that the parties be in competition for commercial benefit (*see Capitol Records, Inc. v Naxos of Am., Inc.*, 4 NY3d 540, 563 [2005]). Since plaintiffs concededly abandoned their attempt to acquire SDL before Starwood Capital completed the transaction, they were not competing.

The claim for misappropriation of proprietary information falls short because plaintiffs did not allege that Edelman took sufficient precautionary measures to insure that the information remained secret, particularly after they abandoned the

acquisition plan (*see Ashland Mgt. v Janien*, 82 NY2d 395, 407 [1993]). Edelman did not obtain a written confidentiality agreement with Starwood Resorts, as would ordinarily be expected to insure continued secrecy. The "confidential" stamp on the documents submitted to a third party was, by itself, inadequate under the circumstances (*see Precision Concepts v Bonsanti*, 172 AD2d 737, 738 [1991]). Moreover, the oral assurance of confidentiality that ODDO allegedly exacted was unenforceable, particularly after six years (*see Meyers Assoc., L.P. v Conolog Corp.*, 19 Misc 3d 1104[A], 2008 NY Slip Op 50552[U] [2008], *affd* 61 AD3d 547 [2009]).

Finally, in their claim for unjust enrichment, plaintiffs allege that defendants wrongfully benefited from Starwood Capital's use of the information and plan that plaintiffs had developed "at substantial costs for their own purposes," and demand that defendants disgorge the profit from the SDL transaction and pay it to plaintiffs. The motion court dismissed that claim on the ground that plaintiffs do not claim Starwood Resorts used and benefited from the plan, and plaintiffs also admit that they lacked any relationship with Starwood Capital and Star GT Acquisition. On appeal, plaintiffs argue that it was premature to dismiss the claim without first affording them disclosure as to whether Starwood Capital is the alter ego of

Starwood Resorts, with which Edelman shared the information and plan allegedly in confidence. But even if the relationship between plaintiffs and Starwood Capital is assumed to be close enough to support a finding of something akin to privity, the unjust enrichment claim fails for different reasons.

An action to recover for unjust enrichment sounds in restitution or quasi-contract (*Waldman v Englishtown Sportswear*, 92 AD2d 833, 836 [1983]). The claim "rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly *at the expense of another*" (*Miller v Schloss*, 218 NY 400, 407 [1916] [emphasis added]; *Flag Wharf, Inc. v Merrill Lynch Capital Corp.*, 40 AD3d 506 [2007]). Moreover, "[t]he general rule is that 'the plaintiff *must have suffered a loss* and an action not based upon loss is not restitutionary'" (*State of New York v Barclays Bank of N.Y.*, 76 NY2d 533, 540 [1990] [quoting Restatement of Restitution § 128, comment f, at 531 (emphasis added)]).

Edelman's ability to profit from his plan was contingent upon his acquisition of SDL. However, he abandoned his attempt to acquire the company long before it was put up for public auction in 2005 and acquired by Starwood Capital. Plaintiffs do not claim that defendants thwarted Edelman's efforts to acquire SDL, but instead blame the Taittinger family. Nor do they claim

that defendants' use of the information and plan in 2005 kept them from using it themselves and participating in the auction. In short, the alleged benefit to defendants of using the proprietary information and plan did not come at plaintiffs' expense, and plaintiffs did not suffer any loss in connection with that use for which restitution is an appropriate remedy.

The cases that plaintiffs rely upon are distinguishable. In *Chestnut Hill Partners, LLC v Van Raalte* (45 AD3d 434 [2007]), the plaintiff entered into an agreement with a leveraged buyout firm under which it would receive a finder's fee for locating a target company for acquisition, in the event that the acquisition was consummated. Although the plaintiff identified a target company, the buyout firm did not complete the transaction. Thereafter, four of its employees left to form a new company that then acquired the target. Asserting a claim for unjust enrichment, the plaintiff alleged that, while still at the buyout firm, the former employees had obtained confidential information from the plaintiff about the target company and used it to consummate the deal. This court found that the defendants benefited at the plaintiff's expense because the latter would have received the finder's fee if the buyout firm had acquired the target. We also pointed out, as further evidence of the validity of the unjust enrichment claim, that the employees'

company voluntarily paid the plaintiff $75,000 after it had acquired the target.

In *Meyers Associates, L.P. v Conolog Corp.* (19 Misc 3d 1104[A], 2008 NY Slip Op 50552[U][2008], *affd* 61 AD3d 547 [2009], *supra*), a provider of investment banking services had documents prepared at its expense in connection with a proposed "Regulation D" securities offering by a corporate client. Thereafter, the client informed the plaintiff that it was deferring the Regulation D offering and instead was pursuing a "Regulation S" offering with another investment banker. The plaintiff alleged that the client used the draft documents that the plaintiff had provided for the Regulation D offering as the basis for the Regulation S offering documents, and asserted a claim for unjust enrichment. The court found that since the client was alleged to have caused the Regulation D offering to be abandoned, a benefit at the plaintiff's expense was sufficiently alleged to support a claim.

However, here plaintiffs abandoned their efforts to acquire SDL some six years before defendants allegedly used the information and plan that Edelman provided. Even if it is assumed that Starwood Capital's and Starwood Resorts' relationship was sufficiently close to impute the knowledge that Starwood Resorts obtained in 1999 to Starwood Capital, a cause of

action has not been stated because plaintiffs fail to allege that defendants profited at their expense and that they suffered a cognizable loss.

Accordingly, the order of Supreme Court, New York County (Eileen Bransten, J.), entered July 3, 2008, which granted defendants' motion to dismiss the amended complaint, should be affirmed, with costs.

All concur.

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

ENTERED: DECEMBER 15, 2009