SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 31, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Sweeny, Catterson, Renwick, JJ.

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

-against-

Andre Jackson,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Sheryl Feldman of counsel) and Dorsey & Whitney LLP, New York (Eric B. Epstein of counsel), for respondent.

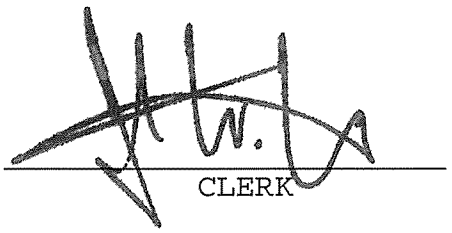
Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered October 17, 2005, convicting defendant, upon his plea of guilty, of robbery in the first degree, and sentencing him to a term of 7 years, unanimously affirmed.

Defendant made a valid and enforceable waiver of the right to appeal (*see People v Lopez*, 6 NY3d 248, 256-257 [2006]). Defendant had extensive discussions with counsel prior to the plea (*see People v Moissett*, 76 NY2d 909 [1990]), and the court did not conflate the right to appeal with the rights automatically waived by pleading guilty. This valid waiver forecloses review of defendant's suppression and excessive

sentence claims. As an alternative holding (*see People v Callahan*, 80 NY2d 273, 285 [1992]), we reject those claims on the merits.

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

ENTERED: MARCH 31, 2009



CLERK

Gonzalez, P.J., Tom, Sweeny, Catterson, Renwick, JJ.

196 Richard Davimos, Jr., Index 111013/02
Plaintiff-Respondent,

-against-

John Halle,
Defendant-Appellant.

Thomas M. Lancia, New York, for appellant.

Reiss Eisenpress LLP, New York (Matthew Sheppe of counsel), for respondent.

Judgment, Supreme Court, New York County (Eileen Bransten, J.; Karla Moskowitz, J. at nonjury trial), entered September 18, 2008, awarding plaintiff damages in the principal amount of $1 million, plus interest from January 7, 2002 until date of judgment in the amount of $582,657.53, unanimously affirmed, with costs.

"[I]t is a well-established principle of contract law that all contemporaneous instruments between the same parties relating to the same subject matter are to be read together and interpreted as forming part of one and the same transaction" (*see TBS Enterprises, Inc. v Grobe*, 114 AD2d 445 [1985] [citations and internal quotation marks omitted], *lv denied* 67 NY2d 602 [1986]). In determining whether contracts are separable or entire, "the primary standard is the intent manifested, viewed in the surrounding circumstances" (*Williams v Mobil Oil Corp.*, 83 AD2d 434, 439 [1981] [citations omitted]).

The evidence at trial overwhelmingly demonstrated that defendant's personal guarantee, Total Film Group's (TGF) corporate guarantee, TGF president Gerald Green's personal guarantee, and TGF subsidiary 1st Mister's promissory note to plaintiff for $1 million, all executed the same day, December 20, 1999, were part of the same transaction. The evidence showed that defendant actively participated in the deal; knew the loan amount to be for $1 million; agreed to guarantee the loan because he knew plaintiff would not loan money without his guarantee; and received a $50,000 commission in connection with arranging the loan. Green testified that the $1 million note, dated December 20, 1999, was in return for plaintiff's investment in 1st Mister and was the note referenced in the corporate guarantee executed December 20, 1999. The fact that the guarantees all reference a December 17, 1999 note is of no moment, in light of the foregoing.

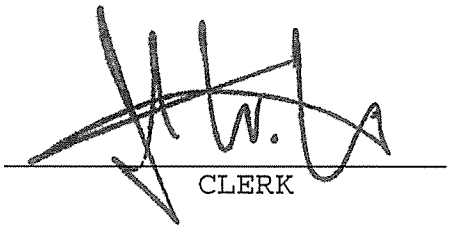
Furthermore, as noted by the trial court, defendant's guarantee was a continuing one. A guarantor is bound by an anticipatory agreement in his undertaking that he will not be relieved of liability by a modification of the principal contract (*see Banque Worms v Andre Café, Ltd.*, 183 AD2d 494 [1992]). Thus, even assuming, arguendo, that the parties intended their guarantees to refer to the "unsigned note," as defendant alleges, rather than the December 20, 1999 note simultaneously executed,

their guarantees would nonetheless extend to the executed note because they were continuing.

In view of the foregoing, we need not reach defendant's contentions concerning the findings of fraud. His remaining arguments are unavailing.

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

ENTERED: MARCH 31, 2009



CLERK

Gonzalez, P.J., Tom, Sweeny, Catterson, Renwick, JJ.

197 Melanie Bryan, Index 18964/04
Plaintiff-Respondent,

-against-

250 Church Associates, LLC, et al.,
Defendants-Respondents,

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

Mayco Building Services, Inc.,
Defendant-Appellant.

[And A Third-Party Action]

O'Connor, O'Connor, Hintz & Deveney, LLP, Melville (Michael T. Reagan of counsel), for appellant.

Irom, Wittels, Freund, Berne and Serra, P.C., Bronx (Wesley M. Serra of counsel), for Melanie Bryan, respondent.

Gannon, Rosenfarb & Moskowitz, New York (Peter J. Gannon of counsel), for 250 Church Associates, LLC and 250 Church Group, LLC, respondents.

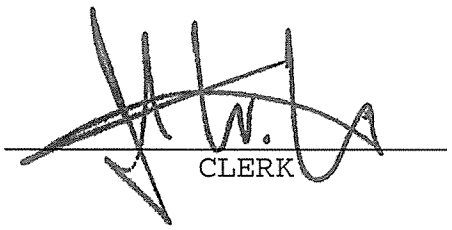
Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered July 14, 2008, which, insofar as appealed from, denied defendant Mayco Building Services, Inc.'s motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant's argument in support of its motion is that there is no evidence that it was negligent. However, defendant "cannot obtain summary judgment by pointing to gaps in plaintiff['s] proof" (*Torres v Industrial Container*, 305 AD2d 136 [2003]). It

must tender evidence that it was not negligent (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Greenidge v HRH Constr. Corp.*, 279 AD2d 400, 402 [2001]).

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

ENTERED: MARCH 31, 2009



Gonzalez, P.J., Tom, Sweeny, Catterson, Renwick, JJ.

198 In re Nakym S.,

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

Kimberly N.,
Respondent-Appellant,

Administration for Children's Services
of the City of New York,
Petitioner-Respondent,

Keith T., et al.,
Respondents,

John J. Marafino, Mount Vernon, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for Administration for Children's Services of the City of New York, respondent.

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

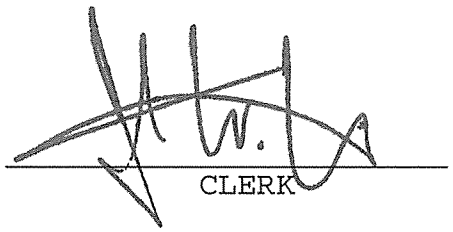
Order of disposition, Family Court, Bronx County (Carol A. Stokinger, J.), entered on or about January 19, 2006, which, to the extent appealed from, after a fact-finding determination that respondent mother neglected the subject child, placed the child with the Commissioner of Social Services until completion of the next permanency hearing, unanimously affirmed, without costs.

The finding of neglect was established by a preponderance of the evidence (Family Court Act § 1046[b][I]; *see also Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]). Petitioner satisfied its initial prima facie showing of neglect by expert medical

testimony establishing that the child sustained immersion burns to the buttocks, which were "of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent" (Family Court Act § 1046[a][ii]). Respondent failed to rebut the presumption of culpability with a credible and reasonable explanation of how the child suffered the burns and why she did not seek treatment earlier (*see Matter of Philip M.*, 82 NY2d 238, 244-245 [1993]). Furthermore, there exists no basis to disturb the court's credibility determinations, particularly its decision to credit the opinion of petitioner's expert over that of respondent's expert (*see Matter of Ashanti A.*, 56 AD3d 373 [2008]; *Matter of Benjamin L.*, 9 AD3d 153, 155 [2004]).

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

ENTERED: MARCH 31, 2009



CLERK

Gonzalez, P.J., Tom, Sweeny, Catterson, Renwick, JJ.

199 Carey Lovelace, Index 115548/07
Plaintiff-Respondent,

-against-

Eugene Krauss, et al.,
Defendants-Appellants.

Lazer, Aptheker, Rosella & Yedid, P.C., Melville (Zachary Murdock of counsel), for appellants.

Nadel & Associates, P.C., New York (Lorraine Nadel of counsel), for respondent.

Judgment, Supreme Court, New York County (Milton A. Tingling, J.), entered October 14, 2008, declaring the contract between the parties cancelled and directing defendant escrowee to return plaintiff's deposit of $955,450, unanimously affirmed, with costs.

The subject of the underlying litigation is the July 24, 2007 contract of sale and rider between the parties wherein plaintiff offered to purchase two units in an East Side cooperative apartment building in Manhattan. Plaintiff placed a down payment of $955,450 with the sellers' law firm, as escrowee.

"It is an elementary rule of contract construction that clauses of a contract should be read together contextually in order to give them meaning" (*HSBC Bank USA v National Equity Corp.*, 279 AD2d 251, 253 [2001]). Under ¶ 1.23.2 of the contract and ¶ 49 of the rider, plaintiff identified as an occupant her

dog, which suffered from a congenital heart condition and high blood pressure, and which she intended to keep for the remainder of the dog's life. Reading these paragraphs together, it is clear that plaintiff intended the dog to live with her in these premises.

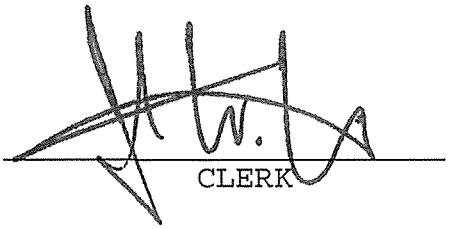
Co-op board approval was required as a condition precedent to defendants' sale of these premises to plaintiff (*see Pober v Columbia 160 Apts. Corp.*, 266 AD2d 6 [1999]). Although the House Rules (incorporated by reference in the contract) specified that permission to have a pet would be subject to written Board approval and plaintiff set forth in the contract her intent to have her dog living with her, the Board's approval letter only allowed plaintiff to have a dog present in her apartment "on occasion." Under these circumstances, where there was still an area of disagreement to be resolved, there was no unconditional approval by the Board (*Moss v Brower*, 213 AD2d 215 [1995]; *Arnold v Gramercy Co.*, 15 AD2d 762 [1962], *affd* 12 NY2d 687 [1962]).

The plain language of the contract permitted either party to cancel if unconditional approval was not obtained. Pets enjoy a "cherished status . . . in our society" (*Raymond v Lachmann*, 264 AD2d 340, 341 [1999]), and there is no evidence to support the assertion that plaintiff used her dog as a pretext for cancelling the contract. Defendants have not sufficiently demonstrated how additional discovery might preclude the grant of summary judgment

(*see Lambert v Bracco*, 18 AD3d 619, 620 [2005]), since there is no evidence that the Board would have assented unconditionally to the dog's permanent presence, or that plaintiff might have agreed to a modified restriction.

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

ENTERED: MARCH 31, 2009



At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on March 31, 2009.

Present - Hon. Luis A. Gonzalez, Presiding Justice
Peter Tom
John W. Sweeny, Jr.
James M. Catterson
Dianne T. Renwick, Justices.

The People of the State of New York, Ind. 617/05
Respondent,

-against- 200

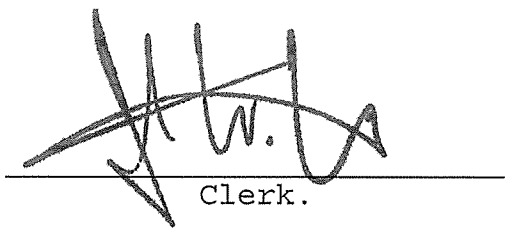
Luis Eugenio,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Micki A. Scherer, J.), rendered on or about July 27, 2005,

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

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

ENTER:



Clerk.

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

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on March 31, 2009.

Present - Hon. Luis A. Gonzalez, Presiding Justice
Peter Tom
John W. Sweeny, Jr.
James M. Catterson
Dianne T. Renwick, Justices.

The People of the State of New York, Ind. 2051/03
Respondent, 6454/04

-against- 202

Robert Murray,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (William A. Wetzel, J.), rendered on or about September 7, 2005,

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.

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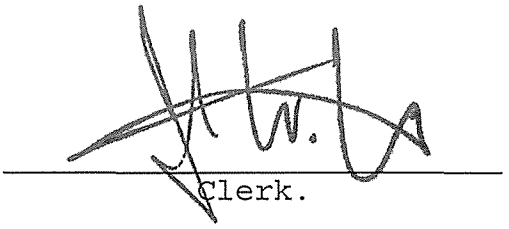


Clerk.

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

Gonzalez, P.J., Tom, Sweeny, Catterson, Renwick, JJ.

204 The People of the State of New York, Respondent, Ind. 3773/06

-against-

Tyheem Smith, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered March 28, 2007, as amended on April 26, 2007, convicting defendant, upon his plea of guilty, of robbery in the first degree and four counts of kidnapping in the second degree, and sentencing him, as a second felony offender, to concurrent terms of 22 years, unanimously modified, on the law, to the extent of vacating the sex offender certification and remanding for further certification proceedings, and otherwise affirmed.

After sufficient inquiry, the court properly denied defendant's motion to withdraw his guilty plea (*see People v Frederick*, 45 NY2d 520 [1978]). The record established that the plea was knowing, intelligent and voluntary. Defendant's claim of innocence was unsupported, as well as being contradicted by the record, and he did not advance any other legally cognizable

grounds for withdrawing the plea. Since the motion was meritless, his attorney's failure to adopt it did not require assignment of new counsel (*see e.g. People v Davis*, 37 AD3d 238 [2007], *lv denied* 9 NY3d 842 [2007]).

The plea was not rendered involuntary by the fact that the court did not mention the mandatory surcharge and fees during the allocution (*People v Hoti*, __ NY3d __, 2009 NY Slip Op 01249).

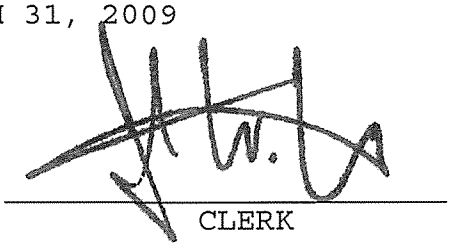
The court, which neglected to certify defendant as a sex offender at sentencing, erred in doing so at a proceeding conducted approximately a month later in the absence of defendant and his counsel. There is also no indication that either defendant or his attorney were notified of this proceeding. Sex offender certification pursuant to Correction Law § 168-d(1), which is distinct from the registration and risk level determination, is part of the judgment of conviction, even if not part of the sentence (*People v Hernandez*, 93 NY2d 261, 267 [1999]). The statute requires the court to perform the certification "upon conviction," and include it in the order of commitment. Since a defendant is entitled to "appellate review for constitutional, substantive or procedural irregularities or illegalities in that aspect of the case" (*Hernandez*, 93 NY2d at 269), it logically follows that a defendant is entitled, if not required, to first raise any such issues before the certifying

court, which would be impractical if certification were to occur subsequent to sentencing in the circumstances presented here.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 31, 2009



CLERK

Gonzalez, P.J., Tom, Sweeny, Catterson, Renwick, JJ.

205 Alma Encarnacion, Index 6797/07
Plaintiff-Respondent,

-against-

Tegford Realty LLC, et al.,
Defendants-Appellants.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Anna A. Higgins of counsel), for appellants.

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

Order, Supreme Court, Bronx County (Kenneth L. Thompson Jr., J.), entered October 15, 2008, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

Plaintiff fell on defendants' staircase when her foot twisted in a "crater" or "hole" on the third step. The defect had apparently been there since plaintiff moved into the building more than two years earlier, although at the time of the accident, she was on her way out for an activity, and was not paying attention as she descended the stairs.

Accepting that the photos in the record accurately depicted the condition of the steps on the date of the accident, defendants established a prima facie entitlement to summary

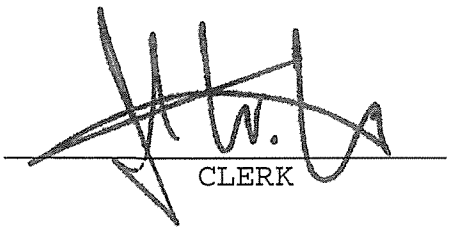
judgment. The trivial depression in the step did not constitute a trap or nuisance, and was not actionable as a matter of law (*Guerriero v Jand*, 57 AD3d 365 [2008]; *see generally Trincere v County of Suffolk*, 90 NY2d 976 [1997]; *Gaud v Markham*, 307 AD2d 845 [2003]).

Plaintiff's submissions did not sufficiently raise an issue of fact. Her expert did not dispute that the depression in the step was no more than 1/4." While he claimed that this differential was not trivial when combined with a 4.4% transverse slope in the staircase, he did not establish that such a slope constitutes a dangerous condition (*see Ryan v KRT Prop. Holdings, LLC*, 45 AD3d 663 [2007]). Furthermore, plaintiff, in her bill of particulars and deposition testimony, did not claim that the accident was caused by the degree of slope to the next step. Plaintiff identified the spot on the step where she fell and did not establish that the entire step, with its minimal differentials, constituted a snare or trap, leaving her no safe place to walk. Rather, she testified that she was aware of the condition, had walked over it for years, had never tripped before, and was simply not paying attention this time when she

fell. Nor did the deposition testimony of the building superintendent establish that the defect was a trap or snare, or was not trivial.

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

ENTERED: MARCH 31, 2009



Gonzalez, P.J., Tom, Sweeny, Catterson, Renwick, JJ.

206 Ernst Arrasti, Index 101930/06
Plaintiff-Respondent,

-against-

HRH Construction LLC, et al.,
Defendants-Appellants,

Marvin Weiner, Ltd.,
Defendant.

Lester Schwab Katz & Dwyer, LLP, New York (Harry Steinberg of counsel), for appellants.

Sacks & Sacks, LLP, New York (Scott N. Singer of counsel), for respondents.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered October 28, 2008, which, to the extent appealed from, granted plaintiff's motion for partial summary judgment on his claim against defendants-appellants for violation of Labor Law § 240(1), and denied said defendants' cross motion for summary judgment dismissing the complaint, unanimously modified, on the law, the cross motion granted only to the extent of dismissing the claims based on Labor Law § 200 and common-law negligence, and those based on violations of the Industrial Code other than having to do with a properly constructed ramp, and otherwise affirmed, without costs.

The ramp from which plaintiff fell while wheeling a loaded A-frame cart full of construction materials was the sole means of access to the concrete floor, which was approximately 18 inches

below the hoist platform, and was thus a device to protect against an elevation-related risk within the meaning of Labor Law § 240(1) (*see e.g. McGarry v CVP 1 LLC*, 55 AD3d 441 [2008]). There was unrebutted evidence that defendants' failure to equip this ramp with handrails, curbs, cleats or other safety devices was the proximate cause of plaintiff's injuries (*see Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 524 [1985]).

The evidence fails to raise a triable issue of fact that defendants supervised or controlled plaintiff's work at the construction site (*see Lombardi v Stout*, 80 NY2d 290, 295 [1992]), caused or created the dangerous condition, or had actual or constructive notice of the unsafe condition of which plaintiff complains (*cf. Murphy v Columbia Univ.*, 4 AD3d 200, 202 [2004]). Nor did the condition of the ramp render plaintiff's work site an "unreasonably dangerous work environment" (*O'Sullivan v IDI Constr. Co., Inc.*, 7 NY3d 805, 806 [2006]). Accordingly, the claims based on common-law negligence and violation of Labor Law § 200 should have been dismissed.

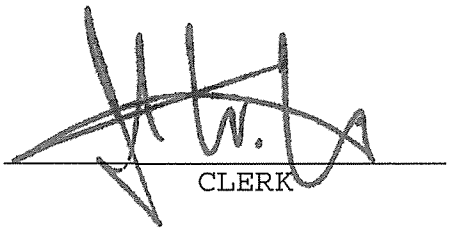
Plaintiff's expert did point out, however, in opposition to the cross motion for summary judgment, that Industrial Code (12 NYCRR) § 23-1.22(b)(3) sets forth specific, positive standards with regard to the construction of runways and ramps, rather than just a general duty of care (*see O'Hare v City of New York*, 280 AD2d 458 [2001]). Plaintiff raised a triable issue of fact that

defendants had violated this regulation by supplying him with a ramp constructed of planking that was not "laid close, butt jointed [or] securely nailed," and which did not have the requisite "timber curbs at least two inches by eight inches full size, set on edge and placed parallel to, and secured to, the sides of" the ramp.

Other sections of the Industrial Code, referred to in plaintiff's brief, have no basis in the record, and accordingly are dismissed as predicates for the cause of action under Labor Law § 241(6).

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

ENTERED: MARCH 31, 2009



CLERK

Gonzalez, P.J., Tom, Sweeny, Catterson, Renwick, JJ.

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

-against-

Phillip Torres, Defendant-Appellant. Ind. 4807/05

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

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

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered April 26, 2006, convicting defendant, upon his plea of guilty, of criminal possession of a forged instrument in the second degree (11 counts), and sentencing him to concurrent terms of 2½ to 7 years, unanimously affirmed.

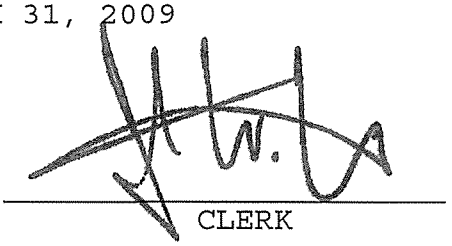
The court properly exercised its discretion when it denied defendant's eve-of-trial request for an adjournment to obtain new retained counsel, since defendant did not establish compelling circumstances, or any legitimate basis for the substitution (*see People v Arroyave*, 49 NY2d 264, 271 [1980]). There is nothing to indicate that his attorney's difficulties in collecting her full fee from defendant created an adversarial relationship or affected her representation of defendant (*see People v Husbands*, 303 AD2d 227 [2003], *lv denied* 100 NY2d 562 [2003]). Furthermore, although the proposed substitute attorney had

contacted the court shortly before trial and had been advised by the court to appear on the trial date ready to proceed, he never appeared.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 31, 2009



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on March 31, 2009.

Present - Hon. Luis A. Gonzalez, Presiding Justice
Peter Tom
John W. Sweeny, Jr.
James M. Catterson
Dianne T. Renwick, Justices.

x

In Re: New York City Asbestos Litigation

Shannon Harris,
Plaintiff-Appellant,

Index 104741/06

-against-

208

Amchem Products, Inc., et al.,
Defendants,

American Airlines, Inc.,
Defendant-Respondent.

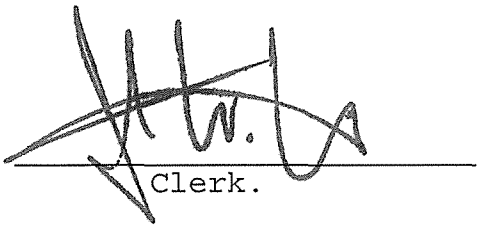
x

An appeal having been taken to this Court by the above-named appellant from a order of the Supreme Court, New York County (Helen E. Freedman, J.), entered on or about January 24, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated March 18, 2009,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTER:



Clerk.

Gonzalez, P.J., Tom, Sweeny, Catterson, Renwick, JJ.

209 Ramesh Bahl, et al., Index 7747/95
Plaintiffs-Appellants-Respondents, 2413/95

-against-

The City of New York,
Defendant/Third-Party Plaintiff-Respondent,

Montefiore Hospital and Medical Center,
Third-Party Defendant-Respondent-Appellant.

Barry S. Gedan, Riverdale, for appellants-respondents.

Sedgwick, Detert, Moran & Arnold, LLP, New York (Jason D. Turken of counsel), for respondent-appellant.

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

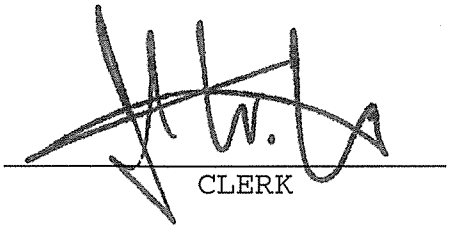
Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered December 21, 2007, which, in an action for personal injuires sustained in a slip and fall on snow and ice in a parking lot owned by defendant City and used by third-party defendant pursuant to a City permit, inter alia, denied third-party defendant's motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for summary judgment, unanimously affirmed, without costs.

Issues of fact exist, including whether there was a reasonable amount of time after cessation of the storm and before

plaintiff's accident to clear the lot of snow and ice (*see Valentine v City of New York*, 86 AD2d 381, 383 [1982], *affd* 57 NY2d 932 [1982]; *Bowen v City Univ. of N.Y.*, 294 AD2d 322 [2002]). We have considered the parties' other arguments and find them unavailing.

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

ENTERED: MARCH 31, 2009



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Gonzalez, P.J., Tom, Sweeny, Catterson, Renwick, JJ.

210N-
210NA
210NB Briarpatch Limited, L.P., et al., Index 603364/01
Plaintiffs-Appellants,

-against-

Briarpatch Film Corp., et al.,
Defendants,

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

Barry L. Golden, New York, for appellants.

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

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered June 18, 2008, which denied plaintiffs' motion for leave to amend the third amended complaint, unanimously reversed, on the law, without costs, the motion granted, and the matter remanded for further proceedings including further discovery. Orders, same court and Justice, entered September 12, 2008, which denied renewal of plaintiffs' motion for leave to amend the complaint, and which closed discovery in this action and directed that plaintiffs file a note of issue, unanimously dismissed, without costs, as academic in view of the foregoing.

Leave to amend pleadings is to be freely given, absent a showing of prejudice or surprise (see CPLR 3025[b]; *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]). Here,

there was no showing of prejudice or surprise resulting from plaintiffs' delay in asserting new claims to conform the complaint to the proof (CPLR 3025[c]) and to increase the ad damnum clause, especially in light of the history of defendants' belated responses to plaintiffs' discovery demands (*see Curiale v Ardra Ins. Co.*, 223 AD2d 445 [1996]). Nor were plaintiffs' moving papers unreliable or insufficient to support the new claims (*see Peach Parking Corp. v 346 W. 40th St., LLC*, 52 AD3d 260 [2008]). Defendants' discovery responses were provided to plaintiffs after the latest amendment of the complaint and attached to plaintiffs' motion. The responses sufficiently demonstrated the merits for purposes of amending the complaint to assert new claims for violation of a restraining notice (CPLR 5222) and slander of title (*see 39 Coll. Point Corp. v Transpac Capital Corp.*, 27 AD3d 454 [2006]). Accordingly, leave to amend should have been granted, and discovery should proceed.

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

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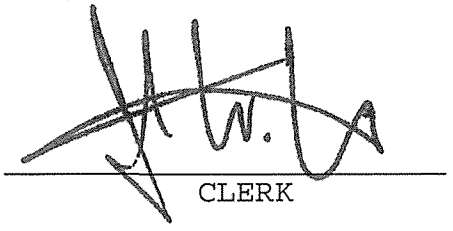


CLERK

Gonzalez, P.J., Tom, Sweeny, Catterson, Renwick, JJ.

211N Kimberly Creekmore, Index 105095/05
Plaintiff,

-against-

PSCH, Inc.,
Defendant-Respondent,

Creedmoor Psychiatric Center,
Nonparty-Appellant.

Andrew M. Cuomo, Attorney General, New York (Ann P. Zybert of counsel), for appellant.

Jones Hirsch Connors & Bull P.C., New York (Richard Imbrogno of counsel), for respondent.

Order, Supreme Court, New York County (Martin Shulman, J.), entered April 4, 2008, which, after an in camera document review, directed nonparty appellant Creedmoor Psychiatric Center to produce redacted copies of 10 of the 93 documents requested by defendant, unanimously affirmed, without costs.

The motion court providently exercised its discretion in determining that redacted versions of 10 of the documents, purportedly subject to the statutory privilege afforded by Education Law § 6527(3), are probative, material and necessary to aid defendant in its defense of this action, where appellant failed to demonstrate that it would suffer any prejudice by their

production to defendant (*see* CPLR 3103, Education Law § 6527 [3]).

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

ENTERED: MARCH 31, 2009

CLERK

Friedman, J.P., Nardelli, Catterson, DeGrasse, JJ.

89 In re Ernestine Williams, Petitioner, Index 406990/07

-against-

Shaun Donovan, as Commissioner of the New York City Department of Housing Preservation and Development, et al., Respondents.

Lenox Hill Neighborhood House, New York (Kati Daffan (Kathleen Bliss Daffan) of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Jane L. Gordon of counsel), for municipal respondent.

Gutman, Mintz, Baker & Sonnenfeldt, P.C., New Hyde Park (Olga Someras of counsel), for Frawley Plaza LLC, respondent.

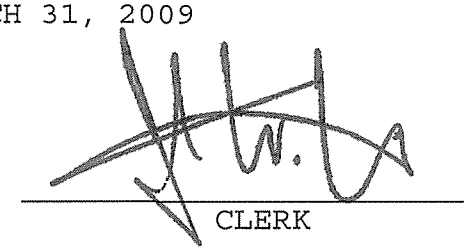
Determination of respondent New York City Department of Housing Preservation and Development (HPD), dated October 19, 2007, which terminated petitioner's Section 8 subsidy on the ground that she failed to report all household income, unanimously modified, on the law, to the extent of vacating the penalty, and remitting the matter to HPD for imposition of a lesser penalty, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Kibbie F. Payne, J.], entered August 19, 2008), otherwise disposed of by confirming the remainder of the determination, without costs.

The determination that petitioner failed to report income

earned by her adult son is supported by substantial evidence (*see Matter of Purdy v Kreisberg*, 47 NY2d 354, 358 [1979]). However, we find the penalty of terminating the subsidy of petitioner, who is 73 years of age, has resided in the apartment for 28 years and has heretofore had an unblemished tenancy, shockingly disproportionate to the offense (*see Matter of Gray v Donovan*, 2009 NY Slip Op 00123 [2009]; *Matter of Davis v New York City Dept. of Hous. Preserv. & Dev.*, 2009 NY Slip Op 00024 [2009]; *Matter of Peoples v New York City Hous. Auth.*, 281 AD2d 259 [2001]). On remand, HPD should calculate the precise amount of excess subsidy received by petitioner, if any, and then determine an appropriate lesser penalty.

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

ENTERED: MARCH 31, 2009



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Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.

113 Edith Wiener, an individual partner of Absar Gerard Associates and in her capacity as Co-Executrix of the Estate of Johanna W. Ackerman,
Plaintiff-Respondent,

-against-

Laura Spahn, et al.,
Defendants-Appellants. Index 301332/08

Eric Michael Pasinkoff, New York for Laura Spahn appellant.

Heller, Horowitz & Feit, P.C., New York (Stuart A. Blander of counsel), for Chaim Schweid appellant.

Novick & Associates, Huntington (Donald Novick of counsel), for respondent.

Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered on or about August 8, 2008, which denied the motions of defendants' Laura Spahn and Chaim Schweid to dismiss the complaint pursuant to CPLR 3211(a)(1), (3) and (7), unanimously affirmed, without costs.

Defendants are not entitled to dismissal of the complaint pursuant to CPLR 3211(a)(1), since they have not demonstrated that the documentary evidence definitively resolves all material issues of fact, thereby resulting in the failure of plaintiff's claim as a matter of law (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 [2002]; *Foster v Kovner*, 44 AD3d 23, 28 [2007]). Accepting as true the facts alleged in the complaint for the purpose of the motion, according plaintiff the

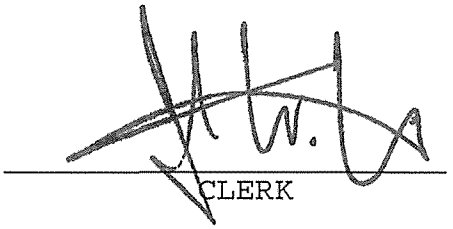
benefit of every favorable inference, and determining whether the facts as alleged fit any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), we reject the argument that defendant Spahn owned her share of the property individually as a tenant in common, since all of the individual owners transferred their equity interests in the property to a family partnership set up for that purpose. Spahn allegedly violated the terms of the partnership agreement, which required her to obtain the consent of the remaining partners prior to selling or assigning her interest in the property.

Defendants are also not entitled to dismissal under CPLR 3211(a)(3), lacks the capacity to sue as co-executrix. A fiduciary has an obligation to protect the interests of the estate especially where a co-fiduciary is alleged to have acted to the contrary (*see SCPA 2102 [6]; Matter of Wallens*, 9 NY3d 117 [2007]; *Birnbaum v Birnbaum*, 73 NY2d 461 [1989]; *see also Matter of Donner*, 82 NY2d 574 [1993]).

Finally, dismissal of the complaint was properly denied (*see Gro-Up Frocks v Manners*, 55 AD2d 531 [1976].

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

ENTERED: MARCH 31, 2009



CLERK

Friedman, J.P., Sweeny, McGuire, Renwick, Freedman, JJ.

4887 Mary Glover, Index 14080/02
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant.

Wallace D. Gossett, New York (Steve S. Efron of counsel), for appellant.

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

Judgment, Supreme Court, Bronx County (Larry S. Schachner, J.), entered July 30, 2007, after a jury verdict and award of damages in plaintiff's favor, reversed, on the law, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Plaintiff injured her leg when she slipped in the space between the subway platform and a downtown # 4 train at the 149th Street-Grand Concourse station in February 2001. After stepping onto the train with her right leg, plaintiff's left leg descended to a point above her knee and remained trapped for 15 or 20 minutes, until the subway car could be lifted by emergency equipment. Plaintiff claimed that defendant breached its duty of reasonable care, based on its own 1987 guidelines limiting the maximum tolerable gap between a subway car and a platform to six inches.

However, Plaintiff failed to demonstrate defendant's breach of a duty of reasonable care to remedy an unsafe condition. Her testimony that her leg went into the gap above the knee, and that the circumference of her thigh measured just above the knee was more than 16 inches, was insufficient to prove that the space between the train and the subway platform was greater than six inches. Plaintiff's civil engineering expert testified that based on his measurements four years after the accident, he concluded that the diameter of her leg above the knee was 6.68 inches. These measurements did not establish the size of the gap at the time of the accident. Even if the leg diameter exceeded six inches by a small amount, the wedging undoubtedly compressed it. That was why plaintiff's leg could not be easily extricated. Furthermore, defendant's measurements of the space between this platform and the doors of standard subway cars, both 9 months before and 15 months after the incident, demonstrated that the horizontal gaps at this point on the platform varied from 1.75 inches to 3.75 inches, and the vertical differential between platform and subway car floor was 4.5 inches. It should be noted that plaintiff's expert never measured any spaces at the station at issue, instead basing his testimony solely on plaintiff's leg measurements some four years after the accident. Thus, his

contentions were at best speculative (*see Wilson v City of New York*, 271 App Div 1008 [1947], *revg* 64 NYS2d 149 [App Term 1946, *see dissenting op of McLaughlin, J.*]).

The dissent's reliance on *Pemberton v New York City Tr. Auth.* (304 AD2d 340 [2003]) is misplaced in that the Transit Authority's own measurements in *Pemberton* showed that the gap in some areas exceeded six inches; moreover, the trial court there had granted summary judgment dismissing the complaint prior to trial. Similarly, in *Johnson v New York City Tr. Auth.* (7 Misc 3d 42 [App Term 2005]) there was testimony by Transit Authority personnel that the space between the platform and train was well in excess of six inches, and that missing rubber boards contributed to an unsafe condition.

All concur except Renwick, J. who dissents in a memorandum as follows:

RENWICK, J. (dissenting)

Plaintiff commenced this action to recover damages for personal injuries sustained when she fell in a gap between a platform and a subway car. At trial, defendant tacitly conceded that a gap greater than six inches would constitute a dangerous condition requiring remedial action under these circumstances. The majority, however, now holds that the trial court erred in denying the post-trial motion to dismiss the action on the issue of liability because plaintiff allegedly failed to produce sufficient evidence that the gap in which she fell exceeded six inches. I respectfully dissent because the majority's determination is based upon an erroneous evaluation of the evidence adduced at trial.

A thorough review of the evidence adduced at trial should make it abundantly clear that the jury verdict has ample support in the record. During the liability phase of the bifurcated trial, plaintiff presented the testimony of several witnesses, including her own. Plaintiff testified that her subway accident occurred on the morning of February 28, 2001, when she was on her way to work at the New York Mercantile Exchange, where she was employed as a supervising financial analyst. That morning, plaintiff, who lived in the Bronx, took a taxi to the subway station at 149th Street and the Grand Concourse, with the intention of taking the #4 train to work. Plaintiff, who weighed

between 270 and 280 pounds, both at the time of her accident and at trial, was wearing a pair of size 10 Easy Spirit walking shoes with a ridged sole.

Upon arriving at the station, she went down the steps to the platform which was not yet crowded. The train was waiting on the middle track, which was straight. Plaintiff walked up to the second or third subway car, where there were available seats. As she began to enter through the first door, which was not blocked by any other passengers, she stepped onto the train with her right foot, then picked up her left foot to follow. However, her left foot came down into empty space, as "there was no train there." Her left foot sank between the train and the platform, initially up to about her ankle, then up to her calf, ultimately becoming trapped at a point above her knee at approximately mid-thigh.

Although she could not determine by mere observation how wide the gap was, when plaintiff looked down at her trapped leg, she observed that the gap between the subway car and the platform was "pretty wide." She surmised that the gap must have been greater than six inches because it went up her to thigh, which was wider than six inches; she wears a 9½-inch ankle bracelet. Other riders reacted by running toward plaintiff while yelling to the train conductor not to close the doors. Their movement caused the train to press up against her leg even harder, until

it felt like "it was going to pop." Eventually, emergency rescuers used an air bag to lift up the train and extricate plaintiff's leg.

Plaintiff called as a witness Flander Julien, a civil engineer who was employed by defendant on the date of the accident, as well as at the time of trial. His duties included supervising a crew that undertook measurements of the distance between trains and platforms when a train is stopped at a station. According to Julien, "gap measurements" are taken approximately every two years, using a train with no passengers and only a limited number of Transit Authority workers. He explained that the purpose of taking these measurements is "customer safety," and that gaps exceeding six inches from a straight platform require remedial action under the Transit Authority guidelines. Those guidelines state that the "optimal" horizontal gap for rehabilitated stations is 3½ inches.

Prior to plaintiff's accident, gap measurements were last taken at the southbound track of this station on May 20, 2000, and recorded as between 1.75 and 3.5 inches at various door openings along the train. Those measurements were taken using a model R-62 train, which differs from the model R-33 involved in this case but reportedly had the same dimensions. No gap measurements were taken at this station on the date of the accident. The next measurements were taken on June 22, 2002, 16

months after the accident. The gap was this time measured as ranging from 1.75 to 3.75 inches along the length of the train. Julien explained that gaps normally fluctuate over time and can become wider or narrower.

Finally, plaintiff called Nicholas Bellizzi, a professional engineer who had previously worked for four years in defendant's engineering division.[1] Before testifying at trial, Bellizzi reviewed photographs of the station in question, the deposition testimony given by plaintiff and Julien, and defendant's accident reports. He also measured the length of plaintiff's foot, the length of her shoe, and the circumference of her left leg at the knee and above the knee. The circumference of plaintiff's leg at the knee was 19.5 inches, and above her knee was 21 inches. He then applied a mathematical formula to calculate the diameter of her leg, which was 6.2 inches at the knee and 6.7 inches above it. Her shoe length was eleven inches. He noted that the area around the knee is less pliable and soft, whereas the area above the knee, on the fleshy part of the leg, is more likely to compress if squeezed. In the case of the leg becoming wedged, Bellizi explained, the fleshy top portion would push upward and actually become larger. Based upon his measurements, plaintiff's

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[1] Mr. Bellizzi had a bachelor's degree in civil engineering and a mater's degree in transportation engineering. He also completed all the requirements for a Ph.D. in transportation engineering, except for his dissertation.

weight, and the details of the accident, Bellizzi opined, with a reasonable degree of engineering certainty, that the gap must have exceeded six inches.

Defendant presented no witnesses at the liability phase of the trial. Instead, at the conclusion of plaintiff's presentation, defendant moved for a directed verdict on the ground that plaintiff had failed to offer sufficient evidence that the gap in which she fell was wider than the accepted limit of six inches. The trial court denied the motion. After the jury returned a verdict, finding defendant negligent in the maintenance of the platform and that such negligence was a substantial factor in causing the accident, defendant renewed its motion to dismiss. The trial court denied the motion, and the case proceeded to the damages phase of the bifurcated trial. A second jury awarded plaintiff damages of $700,000 for past pain and suffering and $800,000 for future pain and suffering. This appeal followed.

On a post-trial motion for judgment as a matter of law, the court must determine from the evidence adduced at trial whether there is "no valid line of reasoning and permissible inferences which could possibly lead rational [jurors] to the conclusion" they reached on liability *(Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). A court must exercise considerable caution in exercising its discretionary power to set aside a jury verdict

(*Nicastro v Park*, 113 AD2d 129, 133 [1985]). "The credibility of the witnesses, the accuracy of their testimony, whether contradicted or not, present clear issues of fact to be resolved by the jury" (*White v Rubinstein*, 255 AD2d 378 [1998]). The court must view the evidence in a light most favorable to the non-movant (*Calvaruso v Our Lady of Peace R.C. Church, 36 AD2d 755 [1971]*). Where "the evidence is such that it would not be utterly irrational for a jury to reach the result it has determined upon, and thus a valid question of fact does exist, the court may not conclude that the verdict is as a matter of law not supported by the evidence" (*Cohen*, 45 NY2d at 499).

With regard to a common carrier's duty of care, courts have recognized that some space between the platform and the car is necessary because the "cars must not scrape the platform of the station, and must be far enough away to allow for the oscillation and swaying of the train" (*Ryan v Manhattan Ry. Co.*, 121 NY 126, 131 [1890]; *see also McKinney v New York Consol. R.R. Co.*, 230 NY 194, 199 [1920]). Accordingly, the existence of a space between the platform and the car, necessary to the operation of the train, does not, in and of itself, constitute negligence (*id.*, 121 NY at 136-137; *Iorio v Murray*, 256 App Div 512, 514 [1939]; *Woolsey v Brooklyn Hgts. R.R. Co.*, 123 App Div 631, 633 [1908]; *Tomayo v Murray*, 173 Misc 728 [App Term 1940]). Nonetheless, a common carrier is "charged with the duty of using due care to

provide proper and safe means of getting from the platform of the cars to the platform of the station" (*Boyce v Manhattan Ry. Co.*, 118 NY 314, 318 [1890]). Where the opening may present a danger, the carrier has the obligation to take some reasonable precautionary measures for the safety of the passengers (*Ryan*, 121 NY at 132; *Boyce*, 118 NY at 318; *Woolsey*, 123 App Div at 633).

In this case, plaintiff's evidence at trial presented issues of fact as to whether the space between the platform and the subway car constituted a danger that defendant negligently failed to repair, or otherwise failed to undertake reasonable measures for the safety of the passengers. Initially, it should be pointed out that defendant's own employee, who testified on plaintiff's behalf, acknowledged that pursuant to the Authority's traffic regulations, any gap measurement in excess of six inches is unsafe to passengers and requires remedial action. His testimony went unrefuted by defendant, whose own regulations thus provided the jury "some evidence of negligence" (*Danbois v New York Cent. R.R. Co.*, 12 NY2d 234, 239 [1963]. While a gap of six inches or more does not as a matter of law establish negligence, the reasonableness of a gap in excess of six inches presented a question for the jury (see *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 [2003]).

Moreover, contrary to the majority's conclusion, plaintiff

presented evidence sufficient for a rational juror to conclude that the space between the platform and the subway car was greater than six inches at the time of the accident. The facts of the accident itself provided sufficient proof that the space was greater than six inches. The jury heard evidence that plaintiff weighed between 270 and 280 pounds at the time of the accident, that her size 10 shoes were longer than 10 inches and that she was wedged in the gap up to her thigh. Under the circumstances, it was within the jury's province to infer that the concededly heavy woman's leg was large enough to demonstrate that the gap was greater than six inches, since her leg was able to fit easily within the space (*see id.* at 342 ["Plaintiff's testimony that the gap was wide enough to accommodate his leg above the knee lends credence to the claim that the gap was greater than six inches"]; *Johnson v New York City Tr. Auth.*, 7 Misc 3d 42, 45 [App Term 2005] ["There was also a rational basis for the jury to draw the inference that a dangerous condition was created, since plaintiff's fall caused him to be wedged in between the car and the platform up to his mid-thigh"]). Significantly, this inference is buttressed by the engineering expert's opinion, based on the description of the accident and the measurement of plaintiff's dimensions, that plaintiff's leg was most likely too large to fit into a space that was less than six inches.

The majority holds that neither plaintiff's testimony nor the expert's opinion, alone or combined, is sufficient to prove that the gap was greater than six inches. What the majority overlooks is that plaintiff unequivocally testified that her weight at the time of the accident was the same as her weight at trial, which went unchallenged. Plaintiff's dimensions at trial, which the jury observed and the engineering expert relied upon for rendering his opinion, were thus an adequate representation of what they were when the accident took place.

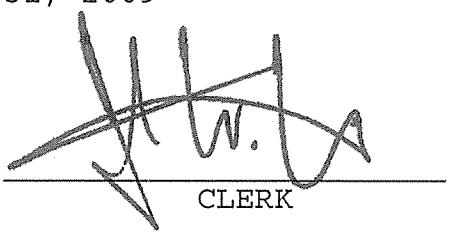
Furthermore, while defendant's measurements at the station twice revealed that the gap was less than six inches, such evidence was not conclusive on the issue, but rather, raised questions of fact for the jury to resolve. The test to be applied in considering a motion to set aside a jury verdict (see Blum v Fresh Grown Preserve Corp., 292 NY 241,245 [1944]) is not based on weighing the evidence but rather whether the court can find that "by no rational process could the fact trier base a finding in favor of the party moved against upon the evidence presented" *(Aetna Cas. & Sur. Co. v Garrett, 37 AD2d 750,751 [1971])*. In this case, it cannot be said that the jury acted irrationally by rejecting defendant's measurements of the gap when faced with the particular measurements of plaintiff and circumstances of her subway accident. Moreover, the jury could have had doubts about the adequacy of defendant's measurements,

since they were taken somewhat remote in time from the accident, 9 months before and 16 months afterward.

The issues having been properly submitted to the jury for factual determination, it is improper for the majority to conclude that the verdict finding defendant negligent was not supported by the evidence as a matter of law. On the contrary, the evidence, viewed in the light most favorable to plaintiff, was sufficient for a rational juror to conclude that the space between the platform and the subway car was greater than six inches at the time of the accident, leading to a determination of liability. Therefore, the court properly denied defendant's post-trial motion for a dismissal of the action.

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

ENTERED: MARCH 31, 2009



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Tom, J.P., Andrias, Nardelli, Buckley, DeGrasse, JJ.

5382 In re 220 CPS "Save Our Homes" Association, et al., Petitioners-Respondents, Index 106658/07

-against-

The New York State Division of Housing and Community Renewal, et al., Respondents-Appellants.

Gary R. Connor, New York (Sandra A. Joseph of counsel), for New York State Division of Housing and Community Renewal appellant.

Rosenberg & Estis, P.C., New York (Luise A. Barrack of counsel), for Madave Properties SPE, LLC appellant.

Jack L. Lester, New York for respondents.

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered June 9, 2008, which denied respondents' motions to dismiss the petition, unanimously reversed, on the law, without costs, the motions granted, the petition denied and the proceeding brought pursuant to CPLR article 78 dismissed.

Petitioners are rent stabilized tenants in a building owned by respondent Madave Properties SPE, LLC. They seek, inter alia, to compel respondent New York State Division of Housing and Community Renewal (DHCR) to conduct an environmental impact study (EIS) pursuant to the State Environmental Quality Review Act (SEQRA) (ECL art 8) in conjunction with its consideration of Madave's application, pursuant to Rent Stabilization Code (RSC) (9 NYCRR) § 2524.5(a)(2), for authorization to refuse to offer

renewal leases prior to demolishing the building. The petition fails to state a cause of action.

DHCR's discretion in determining whether to authorize a refusal to offer lease renewals pursuant to RSC § 2524.5(a)(2) is circumscribed by the criteria whether an applicant has established a financial ability to demolish the building, whether plans for the undertaking have been approved by the appropriate city agency, and whether the applicant has complied with the statutory provisions for the relocation of rent stabilized tenants, the reimbursement of moving expenses, and the payment of stipends (see RSC § 2524.5(a)(2)(ii)(a)-(f)). In deciding an RSC § 2524.5(a)(2) application, DHCR is not authorized to consider the environmental concerns detailed in an EIS (*see Incorporated Vil. of Atl. Beach v Gavalas*, 81 NY2d 322 [1993]). Thus, for SEQRA purposes, DHCR's determination of an RSC § 2524.5(a)(2) application is not an "action" on which the preparation of an EIS

is required, but is merely "ministerial" (*see* ECL § 8-0105[5][ii]; § 8-0109[2]; *Gavalas* at 326; *Matter of Citineighbors Coalition of Historic Carnegie Hill v New York City Landmarks Preserv. Commn.*, 306 AD2d 113 [2003], *appeal dismissed* 2 NY3d 727 [2004]).

THIS CONSTITUTES THE DECISION AND ORDER
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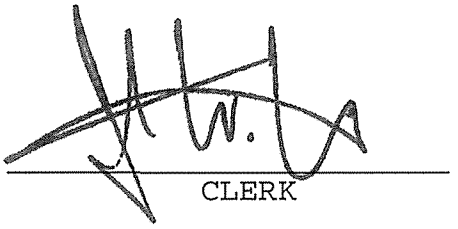

CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on March 31, 2009.

Present - Hon. David B. Saxe, Justice Presiding
John T. Buckley
James M. McGuire
Leland G. DeGrasse
Helen E. Freedman, Justices.

The People of the State of New York, Ind. 800/07
Respondent,

-against- 176

James Tucker,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie Wittner, J. at please; Richard D. Carruthers, J. at sentence), rendered on or about January 18, 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.

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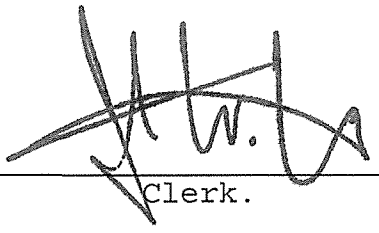


Clerk.

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

Saxe, J.P., Buckley, McGuire, DeGrasse, Freedman, JJ.

178 R.P.I. Services, Inc. doing business as Response Medical Staffing, Plaintiff-Respondent, Index 603216/04

-against-

Jason Eisenberg, et al., Defendants-Appellants.

Pillsbury Winthrop Shaw Pittman LLP, New York (E. Leo Milonas of counsel), for appellants.

Law Offices of Carole R. Bernstein, West Port, Ct (Carole R. Bernstein of counsel), for respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered December 17, 2008, which denied defendants' motion for summary judgment to the extent of setting a maximum amount of damages that may be recoverable, unanimously affirmed, with costs.

Plaintiff alleges misappropriation of trade secrets and tortious interference with prospective business relations by the corporate defendants, as well as breach of contract, breach of loyalty and misappropriation of trade secrets by the individual defendants. The court was unable to ascertain, from the documents submitted, that plaintiffs' recovery should be limited to the net profits it would have earned upon the staffing placement of 12 nurse candidates by the corporate defendants.

In *Duane Jones Co. v Burke* (306 NY 172, 192 [1954]), the

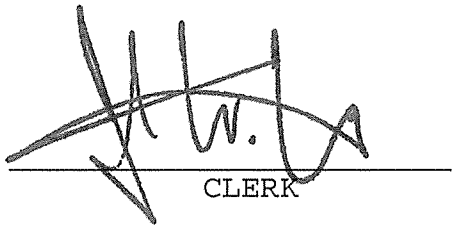
Court of Appeals held that a plaintiff making similar allegations "was entitled to recover as damages the amount of loss sustained by it, including opportunities for profit on the accounts diverted from it through defendants' conduct," and that the plaintiff's loss "was a continuing one extending at least up to the date of trial." The Court declined to limit the jury's ability to assess the extent of damages "when from the nature of the case the amount of the damages cannot be estimated with certainty, or only a part of them can be so estimated" (*see also McRoberts Protective Agency v Landsdell Protective Agency*, 61 AD2d 652 [1978]). On the record before us, the maximum amount of damages cannot be set as a matter of law.

M-833
M-1069 - R.P.I. Services, Inc. v Jason Eisenberg, et al.

Motion seeking leave to supplement record granted and to strike reply brief denied.

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

ENTERED: MARCH 31, 2009



CLERK

Saxe, J.P., Buckley, McGuire, DeGrasse, Freedman, JJ.

180-
180A Arthur Morgenroth, etc., et al., Index 117043/05
Plaintiffs-Appellants,

-against-

Toll Bros., Inc., et al.,
Defendants-Respondents.

Spector & Feldman, LLP, New York (Joel J. Spector of counsel), for appellants.

Seyfarth Shaw LLP, New York (Richard M. Resnik of counsel), for respondents.

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered April 4, 2008, dismissing the amended complaint in its entirety, and bringing up for review an order, same court and Justice, entered March 28, 2008, which, inter alia, granted defendants' cross motion for summary judgment, unanimously affirmed, with costs. Appeal from the aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The court properly denied plaintiffs' motion and granted defendants' cross motion for summary judgment. The unrefuted record evidence established that Toll Brothers acted in a commercially reasonable manner in obtaining the "lowest price possible" when it purchased the 108 3rd Avenue premises (108 premises) for $7.5 million pursuant to the "Other Property" (OP) provision of the parties' agreement. Plaintiffs fail to raise an

issue of triable fact as to whether defendants used commercially reasonable efforts to obtain the property at the lowest purchase price possible within the contemplation of the OP provision.

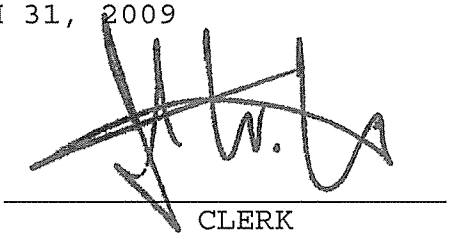
It is undisputed that defendants' acquisition of the 108 premises contemplated its demolition. It is also undisputed that in order to obtain the necessary demolition permit, Toll would need not only to ensure that the building was vacant, but a Certificate of No Harassment, which could only be issued if no tenants had been harassed within the preceding three-year period. Toll reasonably negotiated to ensure that the burdens of obtaining such a certificate and of obtaining tenant lease terminations rested with the seller, RRR, which was in a better position to assume them. The change in the pricing structure to account for the seller's assumption of these burdens was commercially reasonable and necessary to achieve Toll's goal of obtaining a tenant-free building. Moreover, it is undisputed that RRR valued the property in excess of $300 per square foot, which would have resulted in a purchase price in excess of $7.5 million, the amount ultimately paid.

Plaintiffs' argument that defendants owed them a "fiduciary duty" is without legal or factual basis. The only duty owed by defendants to plaintiffs was a contractual one. The claim is duplicative of the breach of contract claim since it fails to

allege breach of any fiduciary duty independent of the contract itself (*see William Kaufman Org. v Graham & James*, 269 AD2d 171, 173 [2000]).

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

ENTERED: MARCH 31, 2009



CLERK

Saxe, J.P., Buckley, McGuire, DeGrasse, Freedman, JJ.

181 Hunts Point Terminal Produce Cooperative Association, Inc., Petitioner-Respondent, Index 6647/06

-against-

New York City Business Integrity Commission, et al., Respondents-Appellants,

New York City Economic Development Corporation, et al., Respondents.

Michael A. Cardozo, Corporation Counsel, New York (Susan Choi-Hausman of counsel), for appellants.

Dechert LLP, New York (Robert J. Jossen of counsel), for Hunts Point Terminal Produce Cooperative Association, Inc., respondent.

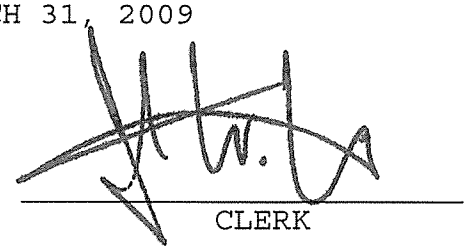
Order and judgment (one paper) of the Supreme Court, Bronx County (Lucy Billings, J.), entered December 3, 2007, which, insofar as appealed from as limited by the briefs and appellant's letter of March 9, 2009, directed respondents New York City Business Integrity Commission (BIC) and Thomas McCormack, within 90 days after entry of the order, to initiate rulemaking of regulations establishing bonding and waste disposal requirements unanimously reversed, on the law, without costs, and the direction vacated.

Since petitioner did not request that BIC and McCormack (BIC's then-chair) initiate rulemaking, Supreme Court should not

have granted that relief (*Matter of Nozzleman 60, LLC v Village Bd. of Vil. of Cold Spring*, 34 AD3d 680, 681 [2006], *lv denied* 9 NY3d 803 [2007]).

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

ENTERED: MARCH 31, 2009



CLERK

Saxe, J.P., Buckley, McGuire, DeGrasse, Freedman, JJ.

183 Sara Kinberg, Index 20612/06
Plaintiff-Appellant,

-against-

Ira E. Garr,
Defendant-Respondent.

Sara Kinberg, appellant pro se.

Ira E. Garr, New York, respondent pro se.

Order, Supreme Court, Bronx County (George D. Salerno, J.), entered on or about October 29, 2007, which, to the extent appealed from, granted defendant's motion to dismiss, unanimously affirmed, with costs.

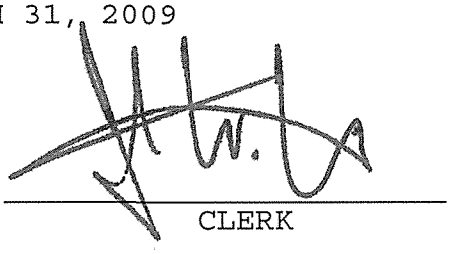
The IAS court properly determined that plaintiff's breach of contract and fraud claims are essentially legal malpractice claims that are barred by the three-year statute of limitations (*see* CPLR 214[6]; *R.M. Kliment & Frances Halsband, Architects v McKinsey & Co.*, 3 NY3d 538, 543 [2004]).

The IAS court properly dismissed plaintiff's third cause of action alleging a breach of the retainer agreement and her sixteenth cause of action alleging a violation of Judiciary Law § 487. Those causes of action are based on issues that were fully litigated in prior actions and determined adversely to her.

Thus, she may not revisit those issues in this action *(see generally Melnitzky v LoPretro,* 8 AD3d 4 [2004]). We have considered and rejected plaintiff's other contentions.

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

ENTERED: MARCH 31, 2009



CLERK

Saxe, J.P., Buckley, McGuire, DeGrasse, Freedman, JJ.

184 Charles Wiener, et al., Index 119788/03
Plaintiffs-Appellants,

-against-

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

Vollmer Associates,
Defendant.

Pazar & Epstein, P.C., New York (Thomas Torto of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo of counsel), for The City of New York, respondent.

Fabiani Cohen & Hall, LLP, New York (Lisa A. Sokoloff of counsel), for Yonkers Contracting Co., Inc., respondent.

Martyn, Toher & Martyn, Mineola (Joseph S. Holotka of counsel), for Safety Marking, Inc., respondent.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered October 3, 2007, insofar as it granted the motion of defendant Yonkers Contracting Co., Inc. and the cross motion of defendant Safety Marking, Inc. for summary judgment dismissing the complaint and all cross claims against them, unanimously affirmed, without costs. Appeal from those portions of the same order which granted defendant City of New York's motion for summary judgment and denied that portion of plaintiff's cross motion to compel disclosure from the City, unanimously dismissed, without costs.

Plaintiff Charles Wiener was injured on May 30, 2003 when

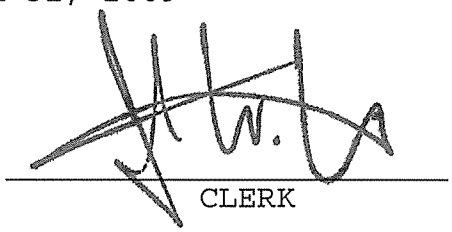
his bicycle allegedly slid on a granular white substance on a bicycle path, causing him to fall. During his 2003 deposition, he stated that he bicycled to work every day along the same path, but had not noticed the granular substance prior to his accident. Nor did he observe any construction activity on that date. Following defendants' respective documentary showings of prima facie entitlement to summary judgment, plaintiffs' proffer of mere conjecture and speculation, rather than admissible evidence, failed to raise a triable issue of fact as to whether any of the moving defendants' negligence caused plaintiff's injury (*see Mandel v 370 Lexington Ave., LLC*, 32 AD3d 302, 303 [2006]; *Kane v Estia Greek Rest., Inc.*, 4 AD3d 189, 190 [2004]).

Plaintiff consented to the granting of defendant City of New York's motion for summary judgment dismissing the complaint against it. Thus, plaintiff is not aggrieved by that portion of the order granting that motion (*see Shteierman v Shteierman*, 29 AD3d 810 [2006]; *D'Imperio v Putnam Lake Fire Dept.*, 262 AD2d 410 [1999]). Moreover, because plaintiff consented to the granting of the City's motion and the dismissal of the complaint against it, that portion of plaintiff's cross motion to compel disclosure from the City is moot. Accordingly, plaintiff's appeal from those portions of the order granting the City's motion and denying that portion of plaintiff's cross motion to compel disclosure from the City are dismissed.

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

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

ENTERED: MARCH 31, 2009



CLERK

Saxe, J.P., Buckley, McGuire, DeGrasse, Freedman, JJ.

185 The People of the State of New York, Respondent, Ind. 11990/91

-against-

John Jackson, Defendant-Appellant.

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

John Jackson, appellant pro se.

Robert M. Morgenthau, District Attorney, New York (David M. Cohn of counsel), for respondent.

Judgment, Supreme Court, New York County (Jeffrey M. Atlas, J. at competency hearing; Michael J. Obus, J. at jury trial and sentence), rendered January 18, 2006, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

The hearing court properly found that defendant was competent to stand trial since he 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], quoting *Dusky v United States*, 362 US 402 [1960][internal quotation marks omitted]; *see* CPL 730.10[1]). Although two psychiatric examiners opined that defendant was not competent because he insisted on pursuing a defense of

posthypnotic suggestion derived from his delusions, the ultimate determination of whether a defendant is an incapacitated person is a judicial, not a medical, one (see *People v Tortorici*, 249 AD2d 588, 589 [1998], *affd* 92 NY2d 757 [1999], *cert denied* 528 US 834 [1999]; CPL 730.30[2]). Defendant expressed a rational understanding of the judicial proceedings, the charges against him, the choices available to him, and the consequences of his decision to pursue a hypnosis defense rather than an insanity defense (*see People v Ward*, 261 AD2d 171 [1999]). The court could also rely on defense counsel's view that the defendant was able to rationally assist in his own defense (*see Tortorici*, 92 NY2d at 766-67). The record establishes that defendant had a rational basis for deciding to pursue the defense.

The trial court properly determined that defendant was competent to represent himself, since he had been found competent to stand trial (*People v Reason*, 37 NY2d 351, 353-54 [1975]; *People v Schoolfield*, 196 AD2d 111, 116 [1994], *lv denied* 83 NY2d 915 [1994]). The court, following a thorough inquiry, properly determined that defendant made a knowing and voluntary waiver of the right to counsel (*see People v Smith*, 92 NY2d 516 [1999]).

The trial court did not err in failing to order a further psychiatric examination or competency hearing, since there was no

change in defendant's functioning (*see People v Morgan*, 87 NY2d 878 [1995]). Defendant's legal advisor raised no concern about defendant's continued competence, and the court was able to interact with defendant and observe his participation in the case (*see People v Snyder*, 29 AD3d 310 [2006], *lv denied*, 7 NY3d 818 [2006]).

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 also reject them on the merits. The challenged remarks did not misstate the applicable law and were fair comment on the evidence (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]).

We perceive no basis for reducing the sentence.

We have considered and rejected defendant's remaining claims, including those contained in his pro se supplemental brief.

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

ENTERED: MARCH 31, 2009

CLERK

Saxe, J.P., Buckley, McGuire, DeGrasse, Freedman, JJ.

186 Josephine Gordian, Index 114182/04
Plaintiff-Respondent,

-against-

Consolidated Edison Company of New York, Inc., et al.,
Defendants-Appellants.

Richard W. Babinecz, New York (Helman R. Brook of counsel), for appellants.

Monaco & Monaco, LLP, Brooklyn (Frank A. Delle Donne of counsel), for respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered September 26, 2008, which, insofar as appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion granted, and plaintiff's cross motion to amend the bill of particulars denied as academic. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

Plaintiff was injured when, while stepping on a manhole cover, the cover flipped open causing plaintiff to fall into the hole; plaintiff also felt "something hot" emanate from the opened hole. Defendants did not own or operate the subject manhole cover, which capped a chute through which coal was delivered into a basement storage room in the early days of a school.

Defendants' motion should have been granted, as the evidence

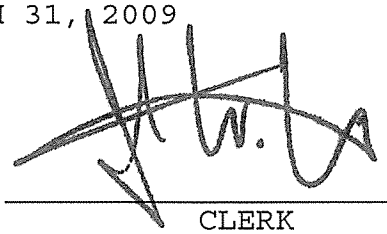
demonstrates that although defendants were performing work on the same street as plaintiff's accident and plaintiff felt "something hot" emanate from the hole when the manhole cover flipped open. The work performed consisted of the boring of holes in the street pavement a considerable distance from the subject manhole cover. No evidence was adduced that the work could have caused steam to escape and built up an amount of pressure in the coal chute capable of loosening the manhole cover enough so that it would flip open if a pedestrian stepped on it. Nor is there any evidence that the manhole cover was dislodged by defendants' workers during the course of their work. Accordingly, plaintiff offers no more than "a shadowy semblance of an issue," which is insufficient to defeat the summary judgment motion (*S. J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974] [internal quotation marks and citation omitted]).

Furthermore, contrary to plaintiff's contention, the affidavit offered by a senior specialist in defendants' Steam Distribution Department in reply to plaintiff's opposition should not be disregarded. The main motion papers disposed of plaintiff's original theory, which was that defendants owned or controlled the subject manhole, and the affidavit in question was introduced to counter the theory newly offered on plaintiffs'

cross motion to amend her bill of particulars, which was that steam service work performed by defendants had been a proximate cause of the accident.

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

ENTERED: MARCH 31, 2009



CLERK

Saxe, J.P., Buckley, McGuire, DeGrasse, Freedman, JJ.

193 The People of the State of New York, Ind. 5516/04
Respondent,

-against-

Changa Bush,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Charles H. Solomon, J. on dismissal motion; Bonnie G. Wittner, J. at jury trial and sentence), convicting defendant of assault in the first degree (two counts) and gang assault in the first degree and sentencing him, as a second felony offender, to concurrent terms of 12 years, unanimously affirmed.

The court properly denied defendant's motion to dismiss the indictment made on the ground that, as the result of an claimed conflict of interest, his original retained attorney failed to carry out defendant's alleged wish to testify before the grand jury. Defendant has failed to demonstrate that any conflict of interest affected, operated on or bore a substantial relation to

the conduct of his defense (*see People v Harris*, 99 NY2d 202, 210 [2002]; *People v Ortiz*, 76 NY2d 652, 657 [1990]; *see also Winkler v Keane*, 7 F3d 304 [2d Cir 1993], *cert denied* 511 US 1022 [1994]). Although defendant asserts that at the time of his indictment his original attorney simultaneously represented the codefendant, neither his motion to dismiss, nor anything else in the record, establish anything more than successive representation. Following defendant's indictment, his original attorney requested to be relieved, and he ultimately represented the codefendant. However, the codefendant was not even arrested until after defendant was indicted, and the codefendant was later indicted by a different grand jury. Defendant's suggestion that at the time of the grand jury proceedings leading to his own indictment, his original attorney was already representing, or intended to represent, the unarrested codefendant rests entirely on speculation. In any event, regardless of whether the standard of prejudice relating to actual conflicts, potential conflicts, or ineffective assistance applies, we find that defendant could not have been prejudiced in any way by the fact that he did not testify before the grand jury. Indeed, defendant fails to provide any reason for concluding that he would not have been charged by the grand jury if he had testified. Finally, we reject defendant's argument that the motion court should have ordered a hearing to "fully explore" his original attorney's

conduct. Defendant's moving papers were insufficient to raise any factual dispute warranting a hearing; a hearing is an adversarial proceeding, not a general inquiry or a substitute for counsel's investigation of the facts.

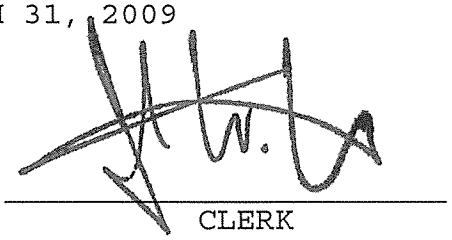
The trial court properly denied defendant's application to replace a sworn juror as grossly unqualified to serve (*see* CPL 270.35[1]). Prior to the commencement of testimony, the juror volunteered to the court that he was having difficulty with the concept that no inference should be drawn from a defendant's failure to testify. The court conducted a probing inquiry (*see People v Buford*, 69 NY2d 290 [1987]), in which it carefully explained to the juror that this concept was the law, and it discussed other legal principles including the prosecution's burden of proof. The juror gave an unequivocal assurance that he understood and would follow the principles explained by the court. Finally, the juror's candor was evident, and we reject defendant's argument that his alleged dishonesty at the time he was selected as a juror independently rendered him grossly unqualified to serve.

The mandatory surcharge and fees were properly imposed (*People v Guerrero*, __ NY3d __, 2009 NY Slip Op 01242).

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 31, 2009



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Richard T. Andrias
Eugene Nardelli
John T. Buckley
Helen E. Freedman, JJ.

4399

In re Barbara N.,
Petitioner-Appellant,

-against-

James H. N.,
Respondent-Respondent.

Petitioner appeals from an order of the Family Court, New York County (Sara P. Schechter, J.), entered on or about August 17, 2007, which, inter alia, denied her objection to an order (Support Magistrate Solange N. Grey), entered June 11, 2007, which dismissed without prejudice the petition seeking to vacate a 1992 child support agreement, to direct a new hearing, and to replace the child support agreement with a new schedule of support.

Stern & Zingman, LLP, New York (Joel S. Stern of counsel), for appellant.

Dreier, LLP, New York (Donald Lockhart Schuck and Elana F. Sinensky of counsel), for respondent.

NARDELLI, J.

The principal issue is whether petitioner is precluded from seeking to modify the terms of an agreement providing for the support of her nonmarital child because of the constraints of Family Court Act § 516(a).

Petitioner became pregnant after a brief relationship with respondent that had ended by the time she gave birth in September of 1991. In 1992, the parties negotiated a child support agreement which was conditioned upon positive blood test results establishing respondent's paternity. The agreement provided, among other things, for respondent to pay a total of $126,050 in installments over a period of nine years, to cover support, child care, education, medical (past and future) and all other expenses of the child until she reached age 21, and was submitted to the Family Court for approval as required by Family Court Act § 516(a). Notice of the petition for approval of the agreement was served on the Commissioner of Social Services pursuant to § 516(b). The parties, each represented by counsel, along with a representative from Social Services, appeared before a Hearing Examiner who reviewed the agreement and made some changes not relevant to this appeal. The Hearing Examiner requested that the guideline calculation of the Child Support Standards Act (CSSA) be added to the agreement. At that point, the parties exchanged

financial disclosure affidavits for the first time. Respondent's annual child support obligation under the guidelines was calculated to be $21,052. The parties agreed, however, that in lieu of the support provisions required by CSSA, respondent would make certain lump sum payments and payments for medical coverage, and that these would best serve the interests of the child. Petitioner specifically agreed that the agreement was in compliance with CSSA, and waived any right to future child support under that statute.

The Hearing Examiner reviewed the changes to the agreement made by the representative from Social Services, and the CSSA child support calculation, and then made a brief inquiry of the parties as to whether they understood the changes and their obligations under the agreement. After the parties answered in the affirmative, he then approved the agreement. Shortly thereafter, respondent acknowledged paternity and an order of filiation was entered by the court. The order incorporated by reference the support agreement. It is undisputed that respondent has made all payments required under that agreement.

In January 2007, petitioner commenced this proceeding to vacate the 1992 order and conduct a new hearing for purposes of issuing a new support order. She claims that the 1992 support agreement did not comply with the provisions of Family Court Act

§ 516. She also argues that the statute was unconstitutional because it discriminates between children born in wedlock and outside wedlock, in that a child born to married parents is eligible for an upward modification of child support under the formula set forth in Family Court Act § 413©, but § 516© bars such re-evaluation for nonmarital children where a support agreement approved by the court under § 516(a) is completely performed. Prior to serving his answer, respondent moved to dismiss the petition on the grounds that he had completely performed his obligations under the agreement.

The matter was referred to a Support Magistrate, who directed the petition be dismissed "due to no prima facie change of circumstances." Petitioner filed an objection, which the Family Court denied. The court dismissed that part of the motion which sought to have section 516 declared unconstitutional.

Since review of the record leads to the conclusion that the hearing examiner failed to comply with the requirements of section 516 in approving the 1992 agreement, we reverse and direct a new hearing, at which the burden will be upon the petitioner to establish that the support obligations no longer provide for the best interests of the child.

Section 516 of the Family Court Act allows a mother and putative father of a nonmarital child to settle a paternity

proceeding by entering into a binding support agreement, but only when the court determines that adequate provision has been made for the support of the child, and it approves the agreement. Even though the statute does not outline any particular line of inquiry for determining the adequacy of the support provisions, "courts have generally considered the parties' financial positions, the child's support and education needs throughout childhood and the interests of the State" (*see Matter of Clara C. v William L.*, 96 NY2d 244, 250 [2001]). The purpose of requiring court inquiry into the adequacy of the support provision is "to ensure that the needs of nonmarital children are adequately met and are not contracted away by their mothers, whose interests may not always coincide with those of their children" (*id.* at 249). Such scrutiny "prevents overreaching by the parties and safeguards the interests of children, who . . . may not be represented by a law guardian" (*id.* at 249-250).

Although the Hearing Examiner in this case purportedly reviewed the agreement and the CSSA calculations, it is evident that the agreement did not provide for adequate support for the child for 21 years. Concededly, there is no requirement that the agreement provide for support in accordance with the amount set forth in the CSSA guidelines. Nevertheless, the lump sum payment of $126,050 (to be paid over a period of nine years), averages

out to approximately $6,000 per year for 21 years, while the calculation under the CSSA would have provided for $21,054 in annual basic child support, even without factoring in any statutory add-ons. The gross disparity between the two figures should at least have prompted the Hearing Examiner to conduct further inquiry. While the agreement may have been in the best interests of the parents, it clearly was not in the best interests of the child, whom the Hearing Officer was obligated to protect.

As was noted by the Court of Appeals, where there has not been proper judicial review and approval of an agreement for compliance with the provisions of § 516, the agreement may not be used to preclude a later proceeding to modify the support provisions (*Clara C.* at 250). Accordingly, this matter must be remanded for further proceedings on petitioner's application for modification of the 1992 child support agreement.

In view of the foregoing, we need not address the issue of the constitutionality of Family Court Act § 516. We note, nevertheless, that even though the statute was found to be constitutional in *Bacon v Bacon* (46 NY2d 477 [1979]), the majority declined to reaffirm its holding in *Bacon*. It pointedly observed that in view of the principles of judicial restraint, it would not "pass upon the continuing viability" of its

determination in *Bacon* (*Clara C.* at 250). The three concurring Judges, however, (none of whom are currently on the bench - Levine, George Bundy Smith, Wesley, JJ.), indicated that they would find that the treatment of nonmarital children under section 516, by precluding them from being able to petition for a modification of child support agreements, could not survive equal protection analysis (*id.* at 258). The concurring Judges reasoned that subsequent legal developments since the decision in *Bacon*, as well as advances in the tests used to determine paternity, had undermined the rationale of treating nonmarital children differently from marital children, for whom modifications in support agreements could be sought under section 413(1) of the Family Court Act.

Furthermore, the United States Supreme Court has on various occasions struck state classifications which more favorably treated children of married parents than of nonmarital parents. In *Gomez v Perez* (409 U.S. 535 [1973]), it found unconstitutional a Texas statute which granted only marital children a judicially enforceable right to support. In pertinent part, the court stated, "once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because [the] natural

father has not married [the] mother" (*id.* at 538).

Thus, while we need make no determination as to the statute's constitutionality, we observe that, to the extent the statute precludes attempts to reverse support agreements for nonmarital children, its constitutionality is questionable.

Accordingly, the order, Family Court, New York County (Sara P. Schechter, J.), entered on or about August 17, 2007, which, inter alia, denied petitioner's objection to an order (Support Magistrate Solange N. Grey), entered June 11, 2007, which dismissed without prejudice the petition seeking to vacate a 1992 child support agreement, to direct a new hearing, and to replace the child support agreement with a new schedule of support, should be reversed, on the law, without costs, and the petition granted to the extent of remanding the matter for a hearing on petitioner's application for modification of the 1992 child support agreement.

All concur.

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

ENTERED: MARCH 31, 2009