SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 6, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

1051 Gladys Robles, as proposed Administrator of the estate of infant deceased Christian Nunez, etc., Plaintiff-Respondent, Index 7758/07

-against-

Palazzolo Realty Corp., et al., Defendants,

Chris Hanover, Defendant-Appellant.

Vozza & Vozza, Harrison (Joseph Vozza of counsel), for appellant.

Sinel & Associates, PLLC, New York (Martin M. Howfield of counsel), for respondents.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered June 11, 2008, which, to the extent appealed from as limited by the briefs, denied so much of defendants' motion as sought summary judgment dismissing the complaint against defendant Chris Hanover, unanimously reversed, on the law, without costs, that portion of the motion granted, and the complaint dismissed as against said defendant. The Clerk is directed to enter judgment accordingly.

Plaintiff bases her causes of action upon allegations of negligence in the maintenance of the apartment building in which

she resided. Hanover is the president of defendant Palazzolo Realty Corp., the owner of the premises. The conduct plaintiff attributes to Hanover amounts to nothing more than nonfeasance, for which he bears no liability as a corporate officer (*see MLM LLC v Karamouzis,* 2 AD3d 161 [2003]). Supreme Court, however, denied the motion with respect to Hanover on the sole ground that he was the registered managing agent of the building. This conclusion could only have been based on an unsworn printout of a building registration summary report of the New York City Department of Housing Preservation and Development (HPD). The court's reasoning was erroneous for two reasons. First, plaintiff never made the claim that Hanover was a registered managing agent. Second, the unsworn HPD report is incompetent hearsay and insufficient to raise a triable factual issue on a motion for summary judgment (*see Toussaint v Ferrara Bros. Cement Mixer,* 33 AD3d 991, 992 [2006]).

THIS CONSTITUTES THE DECISION AND ORDER
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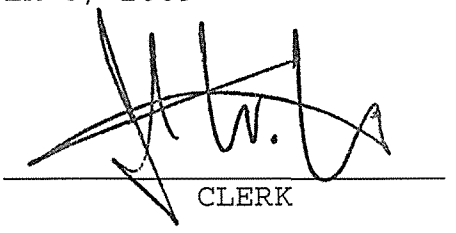

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Saxe, J.P., Sweeny, Moskowitz, Acosta, Richter, JJ.

1108-
1108A In re CPS 1 Realty LP, Index 114766/08
Petitioner-Appellant,

-against-

R.P. Brennan General Contractors & Builders, Inc.,
Respondent-Respondent.

Westermann Sheehy Keenan Samaan & Aydelott, LLP, Garden City (Stephen J. Gillespie of counsel), for appellant.

Foreht Associates, LLP, New York (Stephen R. Foreht of counsel), for respondent.

Orders, Supreme Court, New York County (Barbara R. Kapnick, J.), entered March 10, 2009, which denied petitioner's motions to stay arbitration and granted respondent's motion to dismiss this proceeding, unanimously affirmed, with costs.

On a motion to stay arbitration, the court's "gatekeeper" role is limited to deciding whether there was a valid arbitration agreement, whether the parties complied with the agreement, and whether the claim to be arbitrated was barred by the statute of limitations (*see Cooper v Bruckner*, 21 AD3d 758, 759 [2005]).

Here, the court properly found that the issue of respondent's failure to provide timely notices to petitioner, "though couched in terms of satisfaction of a condition precedent to arbitration, is in actuality nothing more than an allegation of noncompliance with the substantive terms of the contract, a

matter plainly encompassed by the arbitration clause" (*Matter of Montgomery-Otsego-Schoharie Solid Waste Mgt. Auth. [Bonded Insulation Co.]*, 215 AD2d 995, 996 [1995]).

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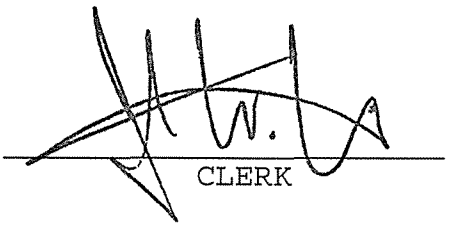

Saxe, J.P., Sweeny, Moskowitz, Acosta, Richter, JJ.

1109 Melanie Suarez, Index 125407/02
Plaintiff-Appellant,

-against-

Leonard Bakalchuk, M.D., et al.,
Defendants-Respondents.

Law Office of Ryan S. Goldstein, PLLC, New York (Ryan S. Goldstein of counsel), for appellant.

Wood & Scher, White Plains (William L. Wood, Jr. of counsel), for Leonard Bakalchuk, M.D., respondent.

Costello, Shea & Gaffney LLP, New York (Steven E. Garry of counsel), for St. Vincent's Hospital, respondent.

Order, Supreme Court, New York County (Sherry Klein Heitler, J.), entered on or about July 7, 2004, which granted the motion and cross motion to dismiss the complaint of defendants St. Vincent's Hospital and Bakalchuk, and denied plaintiff's motion to amend the complaint, unanimously affirmed, without costs.

Plaintiff received emergency treatment for a sinus condition from defendant doctor at St. Vincent's Hospital. Upon her request for a letter to provide to her employer, defendant doctor allegedly gave her a discharge form, which she allegedly gave to her employer without reading. Plaintiff thereafter discovered that the doctor used vulgar language on the discharge form in stating the treatment prescribed. Plaintiff commenced an action against the hospital and the doctor seeking recompense for the intentional infliction of emotional distress.

By including vulgar language on the discharge form, the doctor plainly was acting outside the scope of his employment, and the hospital therefore could not be held liable for the doctor's actions under a theory of respondeat superior (*see Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932 [1999]; *Melbourne v New York Life Ins. Co.*, 271 AD2d 296 [2000]). Accordingly, the court below properly dismissed the action against the hospital.

Moreover, the facts as alleged fail to establish a cause of action. To establish a claim based on the intentional infliction of emotional distress, a plaintiff must establish: (1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and the injury; and (4) severe emotional distress (*Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]). The conduct challenged here, while extremely offensive and bizarre, does not satisfy the requirement of outrageous conduct that could be considered "beyond all possible bounds of decency" and "utterly intolerable in a civilized community" as to be actionable (*Murphy v American Home Prods. Corp.*, 58 NY2d 293 [1983] [internal quotation marks omitted]). Therefore, even accepting the facts as alleged in the complaint to be true, plaintiff has failed to make a prima facie

showing, and the court properly dismissed the complaint (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

The court properly denied plaintiff's motion for leave to amend the complaint to add a new cause of action for the negligent hiring and retention of defendant doctor (*see Thomas Crimmins Contr. Co. v City of New York*, 74 NY2d 166 [1989]; *Megaris Furs v Gimbel Bros.*, 172 AD2d 209 [1991]). Underlying such claim would be the vulgarity included in the discharge form, which was insufficient to sustain a cause of action.

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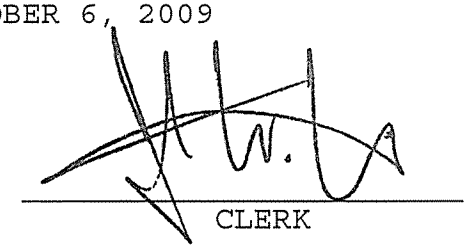

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Saxe, J.P., Sweeny, Moskowitz, Acosta, Richter, JJ.

1110-
1110A In re Jasmine B., and Others,

Children Under the Age of
Eighteen Years, etc.

Derrick B.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

Randall S. Carmel, Syosset, for appellant.

Aleza Ross, Central Islip, Law Guardian for Jasmine B. and Khiry B.

Wendy J. Claffee, Bronx, Law Guardian for Shaniya B.

Order, Family Court, Bronx County (Monica Drinane, J.), entered on or about October 1, 2007, which, after a hearing, found that respondent-father had neglected the subject children, unanimously affirmed, without costs. Order of disposition, same court and Judge, entered on or about November 14, 2007, which, after the fact-finding determination of neglect, placed the child Shaniya B. with petitioner until the completion of the next permanency hearing, unanimously affirmed, without costs.

The record supports the court's credibility determinations made in connection with its finding that the father neglected the children by using drugs in the home and not participating in any rehabilitation program, and by expelling the oldest child from the home without making any provisions for her food or shelter

(Family Court Act § 1012[f][i][A], [B]; *see Matter of Angelyna G.*, 46 AD3d 304 [2007]). Even if the father's claim that the oldest child was a persistent delinquent were to be accepted, that would not itself terminate his support obligations (*see Matter of Roe v Doe*, 29 NY2d 188, 193 [1971]).

Further, evidence of the father's neglect of the oldest child and use of physical violence toward both older children supports the implicit finding of derivative neglect of Shaniiya, since his "behavior demonstrated such an impaired level of parental judgment as to create a substantial risk of harm for any child in his care" (*Matter of Joshua R.*, 47 AD3d 465, 466 [2008], *lv denied* 11 NY3d 703 [2008]; *see Matter of Vincent M.*, 193 AD2d 398, 404 [1993]).

THIS CONSTITUTES THE DECISION AND ORDER
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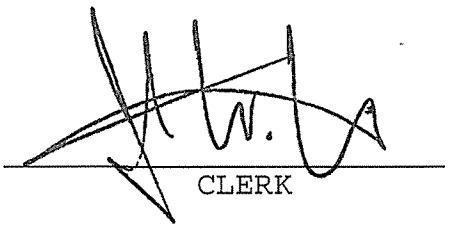

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Saxe, J.P., Sweeny, Moskowitz, Acosta, Richter, JJ.

1111-
1111A The People of the State of New York, Ind. 6228/06
Respondent, 1909/07

-against-

Nelson Sanchez,
Defendant-Appellant.

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

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

Judgments, Supreme Court, New York County, (Daniel P. FitzGerald, J.), rendered October 17, 2007, convicting defendant, after a jury trial, of robbery in the second degree, and also convicting him, upon his plea of guilty, of a robbery in the second degree, and sentencing him to an aggregate term of 4 years, unanimously affirmed.

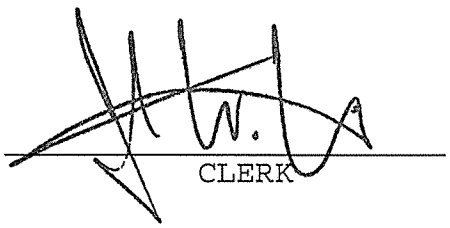
The court properly denied defendant's suppression motion. The showup identification made about 15 minutes after the crime within a few blocks of the crime scene was not unduly suggestive (*see People v Duuvon*, 77 NY2d 541 [1991]). The presence of three or four officers alongside the three unhandcuffed suspects was a justified security measure, and even if the victim heard a radio transmission stating that suspects fitting the description he had given had been stopped, a person of ordinary intelligence would have drawn that inference from the circumstances in any event

(*see People v Gatling*, 38 AD3d 239, 240 [2007], *lv denied* 9 NY3d 865 [2007]).

We perceive no basis for granting defendant youthful offender treatment.

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

ENTERED: OCTOBER 6, 2009



Saxe, J.P., Sweeny, Moskowitz, Acosta, Richter, JJ.

1112 Kingsbridge Heights Rehabilitation and Nursing Center, Inc., Petitioner, Index 260032/08

-against-

Richard Daines, MD, as Commissioner of Health of the State of New York, et al., Respondents.

Ruffo Tabora Mainello & McKay P.C., Albany (Raul A. Tabora, Jr. of counsel), for petitioner.

Andrew M. Cuomo, Attorney General, New York (Marion R. Buchbinder of counsel), for respondents.

Determination of respondent Commissioner of Health, dated September 25, 2007, directing petitioner, a residential health care facility, to return $1,235,000 of Medicaid overpayments it had reported as incurred during its base year as a premium for its participation in a welfare benefit plan to provide life insurance to its employees, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, Bronx County [George Salerno, J.], entered on or about June 5, 2008), dismissed, without costs.

The only document executed by petitioner during its base year relative to its claimed expenditure of $1.235 million for the provision of life insurance to its employees, the Adoption Agreement, provides that if an employee died before a policy had

been purchased, any life insurance benefit payable with respect to such employee by the welfare benefit plan would be limited to the premium that had been paid to the plan's trustee for the purpose of purchasing such life insurance. It is undisputed that petitioner paid no premiums to the plan during the base year. While petitioner did pay the full premium within two months of the base year's conclusion, nothing in the Adoption Agreement required it to do so, and additional evidence, including the Summary Plan Descriptions, which petitioner states were distributed to its employees, provides ample further support for respondent's finding that petitioner's payment of the premium after the base period was not a legal obligation incurred during the base period but instead was optional. There being substantial evidence for the finding that the claimed expense was neither actually made nor legally incurred during the base year, we confirm the determination to disallow it (*see* 18 NYCRR 504.8[a][1]).

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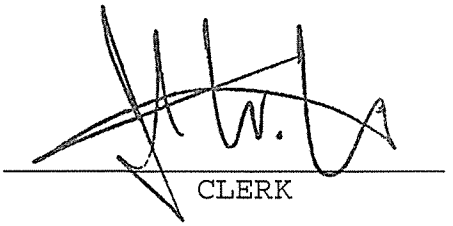

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Saxe, J.P., Sweeny, Moskowitz, Acosta, Richter, JJ.

1113 Michael Salamone, et al., Index 20575/04
Plaintiffs-Respondents,

-against-

Midland Avenue Owners Corp., et al.,
Defendants-Appellants,

Canzone Plaster & Tile, Inc., et al.,
Defendants.

Thomas D. Hughes, New York (Richard C. Rubinstein of counsel), for appellants.

Scarcella Law Offices, White Plains (M. Sean Duffy of counsel), for respondents.

Order, Supreme Court, Bronx County (Alan Saks, J.), entered August 21, 2008, which, inter alia, denied defendants-appellants' motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

The conflicting testimony of plaintiffs and defendants-appellants' building manager and the certified weather reports from weather stations in the areas around Yonkers, where the accident occurred, raise an issue of fact whether there was a "storm in progress" in Yonkers at the time of the accident (*see Krause v City of New York*, 152 AD2d 473 [1989], *lv denied* 76 NY2d 714 [1990]).

We have considered defendants-appellants' argument as to the

admissibility of plaintiffs' expert's affidavit and find it unavailing.

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

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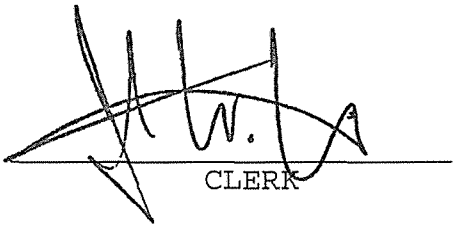

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Saxe, J.P., Sweeny, Moskowitz, Acosta, Richter, JJ.

1114 The People of the State of New York, Ind. 426/08
Respondent,

-against-

William Edwards,
Defendant-Appellant.

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

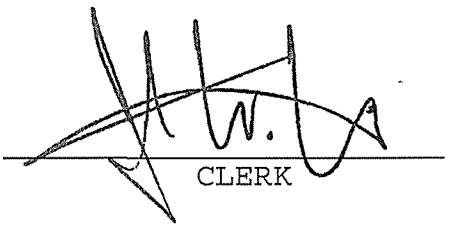
Robert M. Morgenthau, District Attorney, New York (Britta Gilmore of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Rena K. Uviller, J.), rendered on or about October 22, 2008,

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

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

ENTERED: OCTOBER 6, 2009



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

Saxe, J.P., Sweeny, Moskowitz, Acosta, Richter, JJ.

1115 Craig Brown, Index 105230/02
Plaintiff-Appellant,

-against-

Mark G. Speaker MD, et al.,
Defendants-Respondents,

William Tullo OC,
Defendant.

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

LeClairRyan P.C., New York (Neil H. Ekblom of counsel), for Mark G. Speaker M.D. and Laser & Corneal Surgery Associates P.C., respondents.

Law Office of Vincent D. McNamara, East Norwich (Helen M. Benzie of counsel), for TLC Laser Eye Center, respondent.

Judgment, Supreme Court, New York County (Joan B. Carey, J., and a jury), entered August 3, 2007, in defendants' favor in an action for medical malpractice arising out of LASIK eye surgery, unanimously affirmed, without costs.

Considering the evidence in the light most favorable to the prevailing party (*see Mazariegos v New York City Tr. Auth.*, 230 AD2d 608, 610 [1996]), the verdict in defendants' favor on plaintiff's informed consent claim was not against the weight of the evidence, i.e., it could have been reached on a fair interpretation of the evidence (*see Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]). The consent form signed by plaintiff, who is a lawyer, warned, "it is impossible to list every

conceivable complication"; the jury could have credited the opinion of one of defendants' experts that not every risk has to be disclosed in order to obtain informed consent; and the jury could have discredited the opinion of one of plaintiff's experts that plaintiff had a 100% risk of developing daytime glare, halos, and aberrations. "[P]articular deference has traditionally been accorded to jury verdicts in favor of defendants in tort cases, especially if resolution of the case turns on evaluation of conflicting expert testimony" (*Cholewinski v Wisnicki*, 21 AD3d 791 [2005] [internal quotation marks and citation omitted]).

Nor did the trial court's evidentiary rulings deprive plaintiff of a fair trial. Plaintiff's current arguments that defendants improperly cross-examined one of his experts about his website, and plaintiff about his income, are unpreserved, as plaintiff did not object to those questions at trial (*see Hambsch v New York City Tr. Auth.*, 63 NY2d 723, 725 [1984]). Defendants' attorney's reference to Tiger Woods's level of myopia, while cross-examining plaintiff's expert about his opinion that plaintiff's level of myopia was too high for LASIK surgery, was brief -- two pages in a 2840-page trial transcript -- and the trial court ordered that the exchange be stricken from the record and instructed the jury that they could not consider stricken testimony or unanswered questions. The jury is presumed to have

followed the court's instructions (*see People v Davis*, 58 NY2d 1102, 1104 [1983]). Defendants' expert, testifying about the standard of care at the time of plaintiff's surgery in 2000, was properly permitted to rely on articles from 1999-2000 journals that were well-respected and accepted by experts in the field (*see People v Sugden*, 35 NY2d 453, 459 [1974]). Assuming without deciding that this expert should not have been permitted to testify that the articles said that there was a high satisfaction rate even at high levels of myopia, the error was harmless as such testimony was a very small part of defendants' evidence as to the standard of care in 2000. Assuming without deciding that plaintiff's expert should not have been cross-examined about an article that he did not acknowledge as authoritative, having only recognized the journal from which the article came as authoritative, the error was harmless as other secondary sources that he did recognize as authoritative said much the same thing.

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

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

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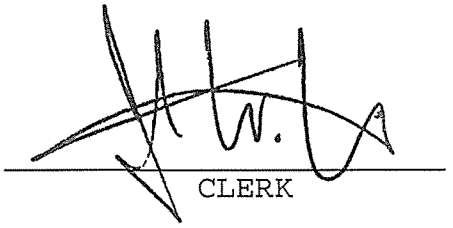

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Saxe, J.P., Sweeny, Moskowitz, Acosta, Richter, JJ.

1116 The People of the State of New York, Ind. 1070/07
Respondent,

-against-

Mujahid Muhammad,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered April 2, 2008, convicting defendant, after a jury trial, of two counts of criminal possession of a forged instrument in the second degree, and sentencing him, as a second felony offender, to a concurrent terms of 3 to 6 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant was driving a car that contained two forged credit cards. Although the car was registered to another person, the circumstances, including the proximity of the cards to items that can reasonably be inferred to be defendant's property, supported the conclusion that defendant was aware he possessed the cards.

Taken as a whole (*see People v Drake*, 7 NY3d 28, 34 [2006]),

the court's charge properly conveyed to the jury that the People were required to prove defendant knew he possessed the credit cards. The court properly responded to notes from the deliberating jury by complying with the jury's specific request for rereadings of the court's original charge on this subject (*see People v Santi*, 3 NY3d 234, 248-249 [2004]; *People v Malloy*, 55 NY2d 296 [1982], *cert denied* 459 US 847 [1982]). The jury did not express confusion or request clarifying instructions.

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

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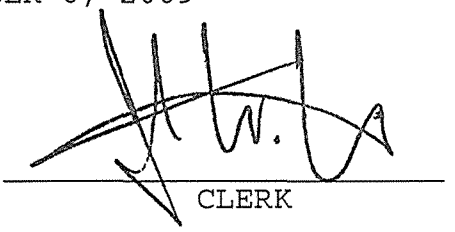

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Saxe, J.P., Sweeny, Moskowitz, Acosta, Richter, JJ.

1117 The People of the State of New York, Ind. 4983/07
Respondent,

-against-

Damien Giles,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered on or about August 5, 2008, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

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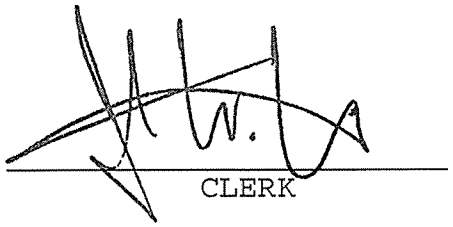

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Saxe, J.P., Sweeny, Moskowitz, Acosta, Richter, JJ.

1119 Sandy LoFaso, et al., Index 104621/00
Plaintiffs-Appellants,

-against-

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

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

Michael F. Fitzgerald, New York, for appellants.

Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for respondents.

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered January 30, 2008, which, in an action arising out of a physical altercation between plaintiff Sandy LoFaso and defendant Crowe, two adult tenants of a housing development, on the development's grounds, insofar as appealed from as limited by the briefs, granted the motion by the development's owner, defendant Metropolitan Life Insurance Company, and its security division and officers, for summary judgment dismissing as against them the causes of action for false arrest, malicious prosecution, defamation, intentional infliction of emotional distress, and loss of consortium, unanimously affirmed, without costs.

LoFaso's claims are based on allegations that Crowe, an off-duty police officer, was the aggressor, and that Met Life and its security officers failed to investigate the incident and

importuned the police to arrest him. The claims for false arrest and malicious prosecution lack merit as probable cause existed to arrest and prosecute LoFaso (*see Martinez v City of Schenectady*, 97 NY2d 78, 84, 85 [2001]; *Burns v City of New York*, 17 AD3d 305 [2005]). Such probable cause is shown by the criminal complaint that was sworn out by the arresting police officer, which avers that LoFaso was arrested and charged with assault based on Crowe's statement to the arresting officer that LoFaso had punched him in the jaw causing a serious physical injury that required hospital admission (*see Iorio v City of New York*, 19 AD3d 452 [2005]). Furthermore, there is no evidence that anyone from Met Life accused LoFaso of anything, let alone affirmatively induced or importuned the officer to arrest him (*see Oszustowicz v Admiral Ins. Brokerage Corp.*, 49 AD3d 515, 516 [2008]); indeed, the security officer's report identified Crowe as the assailant. Even assuming, arguendo, that Met Life supplied "false" information to the police (i.e., that it omitted from the incident report that Crowe had shown his badge to a Met Life security guard and told the latter to "lose" him in the building), these omissions would not undermine the finding of probable cause, given no evidence that the alleged omissions contributed to the decision to arrest LoFaso (*see Brown v Sears Roebuck & Co.*, 297 AD2d 205, 210 [2002]).

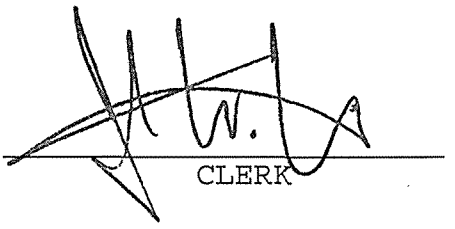
Lofaso's other causes of action also lack merit. The

defamation cause of action was properly dismissed for failure to set forth the particular words complained of (CPLR 3016[a]), and indeed it is only on the appeal that LoFaso advances, for the first time, that he was defamed by the "summary" prepared by Met Life personnel. In any event, it appears that this "summary" was an internal memorandum that was never published to LoFaso's neighbors; to the extent LoFaso claims that he was defamed by the statement that he was arrested for assault, truth provides a complete defense (*see Silverman v Clark*, 35 AD3d 1, 12 [2006]); and to the extent Lofaso claims that he was defamed by the statement that Crowe sustained "a broken jaw," Crowe reasonably believed that he had sustained a broken jaw based on the fact that he had received treatment for a jaw injury at the hospital and, although a fracture was ruled out, he was discharged with a diagnosis of malocclusion status-post trauma and internal jaw derangement. The claim for intentional infliction of emotional distress does not allege conduct that could be considered beyond all possible bounds of decency or utterly intolerable (*see Brown*, 297 AD2d at 212); in any event, there being no evidence that any omissions or false statements by Met Life personnel to the police played any role in the decision to arrest LoFaso, no issue of fact is raised as to the existence of causal connection between Met Life's allegedly outrageous conduct and LoFaso's injury (*see id.*). LoFaso's complaint fails to allege that Met Life violated

his civil rights, and any such claim would in any event be without merit. Dismissal of LoFaso's claims required dismissal of his wife's claim for loss of consortium.

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

ENTERED: OCTOBER 6, 2009



Saxe, J.P., Sweeny, Moskowitz, Acosta, Richter, JJ.

1120-
1121 The People of the State of New York, Ind. 2850/06
Respondent,

-against-

Wahid Sene,
Defendant-Appellant.

The Legal Aid Society, New York (Steven Banks of counsel), and White & Case LLP, New York (Julia Winters of counsel), for appellant.

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

Judgment, Supreme Court, New York County (A. Kirke Bartley, J.), rendered on March 19, 2007, convicting defendant, after a jury trial, of sexual abuse in the first degree and criminal trespass in the second degree, and sentencing him to an aggregate term of 3 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Except for his claim that his conduct did not constitute sexual contact as defined in Penal Law § 130.00(3), defendant's challenges to the sufficiency and weight of the evidence are attacks on the credibility of prosecution witnesses, and we find no basis for disturbing the jury's credibility determinations.

The conviction of sexual abuse in the first degree is

premised on nonconsensual contact between defendant's mouth and the victim's neck. Penal Law 130.00(3) defines sexual contact as "any touching of the sexual or other intimate parts of a person . . . for the purpose of gratifying sexual desire of either party." Defendant argues that because the neck is not located in proximity to sexual organs and is not generally covered with clothing, it cannot be considered an intimate part of the body.

The Court of Appeals has cautioned against "hypertechnical or strained interpretations" of the sexual abuse statute (*People v Ditta*, 52 NY2d 657, 660 [1981]). We conclude that, under general societal norms, the neck qualifies as an intimate part because it is sufficiently personal or private that it would not be touched in the absence of a close relationship between the parties. Moreover, since "intimacy is a function of behavior and not merely anatomy," the manner and circumstances of the touching should also be considered (*People v Graydon*, 129 Misc 2d 265, 268 [Crim Ct, NY County 1985]), and we reject defendant's argument that to do so would conflate the sexual gratification element with the issue of whether a body part is an intimate part. Here, defendant stripped naked, climbed onto the sleeping victim, and licked her neck. This conduct clearly fell within "the plain, natural meaning" (*People v Ditta*, 52 NY2d at 660) of the statute.

The court properly precluded defendant from eliciting testimony that he made an exculpatory statement in the course of

the incident. This was essentially a factual assertion of his innocence constituting hearsay, and there was no relevant basis upon which to receive it other than for its truth (*see People v Reynoso*, 73 NY2d 816, 819 [1988]; *People v Perry*, 223 AD2d 479 [1996]). In any event, the precluded testimony was substantially similar to defendant's exculpatory statement made to a 911 operator, which was in evidence. The court's ruling did not impair defendant's right to confront witnesses and present a defense (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]).

The prosecutor's summation comment on the victim's demeanor while testifying was appropriate. Defendant's remaining challenges to the summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

The court correctly charged the jury that a sleeping person, being unconscious, can be considered to be physically helpless and incapable of consenting to sexual contact (*see e.g. People v Bush*, 57 AD3d 1119 [2008] *lv denied* 12 NY3d 756 [2009]). The charge, read as a whole, conveyed that it was for the jury to decide whether the victim's state of being asleep constituted

physical helplessness within the meaning of Penal Law § 130.00(7).

M-4041 - People v Wahid Sene

Motion seeking to dismiss appeal denied.

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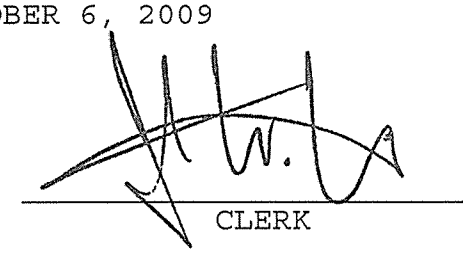

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Saxe, J.P., Sweeny, Moskowitz, Acosta, Richter, JJ.

1122-
1123-
1123A Ban Do Construction, Inc., Index 601918/06
Plaintiff-Respondent,

-against-

Sean Connolly, et al.,
Defendants,

Grace Under Fire, LLC,
Defendant-Appellant.

Michael F.X. Ryan, Croton-on-Hudson, for appellant.

Michael C. Marcus, Long Beach, for respondent.

Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered January 13, 2009, awarding plaintiff the principal sum of $37,990.89, unanimously affirmed, without costs. Appeals from orders, same court (Michael D. Stallman, J.), entered April 25, 2008, to the extent it denied the corporate defendant's motion for summary judgment, and (Lobis, J.), entered on or about December 9, 2008, which granted plaintiff the money judgment after nonjury trial, unanimously dismissed as subsumed in the appeal from the judgment.

Plaintiff sued for the balance due upon its substantial completion of contracted work performed for defendant owners. Summary judgment for the corporate defendant was properly denied because of the triable issue of fact as to why the architect had refused to issue a certificate of substantial compliance. This

certification was a condition precedent for completion of the job. Failure to produce the architect as a defense witness, either on the motion for summary judgment or at trial, raised the inference of the corporate defendant's involvement or influence in the refusal to issue that document, thus frustrating satisfaction of the condition precedent (*see A.H.A. Gen. Constr. v New York City Hous. Auth.*, 92 NY2d 20, 31 [1998]).

As to the question of alternative dispute resolution, the court determined that the contract agreed to by the parties did not contain a provision for arbitration, and in any event, the corporate defendant never demanded such relief, choosing instead to litigate this matter all the way through trial (*see Ryan v Kellogg Partners Inst. Servs.*, 58 AD3d 481 [2009]; *Matter of Advest, Inc. v Wachtel*, 253 AD2d 659 [1998]).

The trial court's findings with respect to the amount of recoverable damages were based upon its evaluation of the evidence and assessment of the credibility of the witnesses, and are supported by the record.

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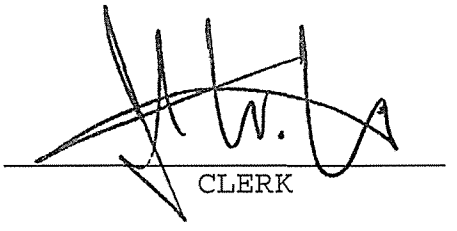

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Saxe, J.P., Sweeny, Acosta, Richter, JJ.

1124 Jose Ortiz, Index 14199/06
Plaintiff-Respondent,

-against-

Wiis Realty Corp.,
Defendant-Appellant.

Kaufman Borgeest & Ryan LLP, New York (Jacqueline Mandell and Dennis J. Dozis of counsel), for appellant.

Steven Wildstein, Great Neck, for respondent.

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered October 14, 2008, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion granted and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Defendant met its burden on summary judgment with a prima facie showing establishing as a matter of law that the criminal assault upon plaintiff by an unknown assailant was unforeseeable, i.e., not reasonably predictable (*see Maria T. v New York Holding Co. Assoc.*, 52 AD3d 356, 358 [2008], *lv denied* 11 NY3d 708 [2008]; *Williams v Citibank,* 247 AD2d 49, 53 [1998], *lv denied* 92 NY2d 815 [1998]). Plaintiff failed to come forth with competent evidence of past criminal activity of "the same or similar type" (*Novikova v Greenbriar Owners Corp.*, 258 AD2d 149, 152-153 [1999]) at defendant's building, to raise a triable issue of fact

with regard to foreseeability (*see Maria T.* at 359).

In light of our determination of non-foreseeability, we need not reach the remaining issues raised by the parties.

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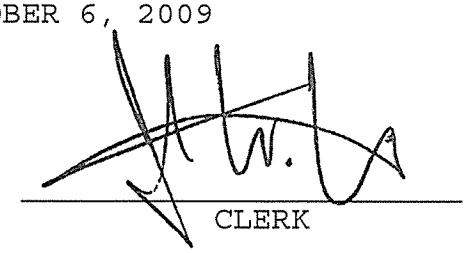

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Saxe, J.P., Sweeny, Moskowitz, Acosta, Richter, JJ.

1125 The People of the State of New York, Ind. 5161/06
Respondent,

-against-

William Porto,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Robert Stolz, J.), rendered July 2, 2007, convicting defendant, after a jury trial, of burglary in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 16 years to life, unanimously affirmed.

The court properly denied defendant's day-of-trial motion for assignment of new counsel since his papers lacked specific factual allegations and did not contain any serious complaint requiring an inquiry by the court (*see People v Beriguette*, 84 NY2d 978, 980 [1994]; *People v Sides*, 75 NY2d 822 [1990]; *People v Paniagua*, 17 AD3d 123 [2005], *lv denied* 5 NY2d 792 [2005]). Defendant chose to make his application entirely by way of a standard form motion that lacked any substance, and upon which he did not elaborate. In any event, the court engaged in a colloquy with defense counsel that did not reveal any reason for

substitution or further inquiry.

Defendant's challenge to the sufficiency of the evidence is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the verdict was based on legally sufficient evidence. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. Defendant's fingerprint found on a cookie tin inside the victim's apartment was sufficient to support the conviction (*see People v Steele*, 287 AD2d 321, 322 [2001]). The victim's credible testimony that he cleaned the tin, including its outside, between the time he acquired it and the time of the burglary negated any reasonable possibility that defendant innocently placed his fingerprint on the tin on some hypothetical occasion such as while shopping.

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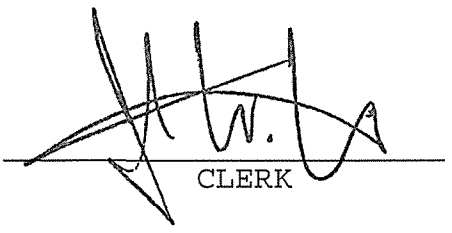

Saxe, J.P., Sweeny, Moskowitz, Acosta, Richter, JJ.

1126-
1126A The People of the State of New York, Ind. 61047C/05
Respondent, 4160/06

-against-

Juan Acosta,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Nancy Killian of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (Efrain Alvarado, J.), rendered on or about April 11, 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 judgments appealed from be and the same are hereby affirmed.

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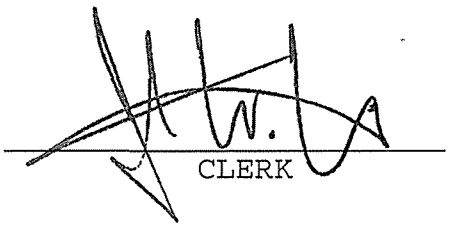

Counsel for appellant is referred to §606.5, Rules of the Appellate Division, First Department.

Saxe, J.P., Sweeny, Acosta, Richter, JJ.

1127N Polygram Holding, Inc., Index 601837/03
Plaintiff-Respondent,

-against-

Al Cafaro,
Defendant-Appellant.

Lawrence W. Rader, New York (David Samel of counsel), for appellant.

Jenner & Block LLP, New York (Andrew H. Bart of counsel), for respondent.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered April 29, 2009, which, to the extent appealed from as limited by the briefs, limited the scope of an EBT granted to defendant and denied defendant's motion to strike the note of issue, unanimously affirmed, without costs.

The court appropriately struck a discretionary balance in granting defendant certain additional discovery consistent with our prior discovery ruling in this matter (42 AD3d 339, 340-341), while maintaining control of its trial calendar (*Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190 [2005]).

We have examined the balance of defendant's argument and find it unavailing.

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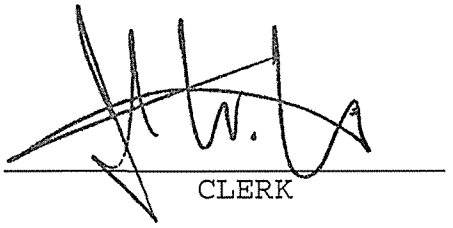

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