SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 8, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

188 In re Anthony J. Raganella, Index 116460/07
Petitioner-Appellant,

-against-

New York City Civil Service
Commission, et al.,
Respondents-Respondents.

Brown & Gropper, LLP, New York (James A. Brown of counsel), for appellant.

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

Order, Supreme Court, New York County (Marilyn Shafer, J.), entered July 8, 2008, which denied the petition seeking to vacate the nullification by respondent Department of Citywide Administrative Services (DCAS) of petitioner's test scores and disqualification from the civil service eligibility list for promotion to police captain, and the refusal of respondent Civil Service Commission (CSC) to hear petitioner's appeal therefrom, unanimously reversed, on the law, without costs, the petition granted to the extent of vacating the determination of CSC that it lacked jurisdiction to consider petitioner's appeal, and the matter remanded for further proceedings consistent herewith.

Petitioner is a member of the New York City Police

Department; he joined the force in 1995 and was promoted to lieutenant in 2003. In May 2006 petitioner took an exam administered by DCAS, exam number 5535, to become a captain. Approximately one month later, petitioner attended a "protest review session" held by DCAS, at which those who took exam number 5535 were given the opportunity to review the exam questions and the proposed model answers and submit challenges to one or more such answers. Instructions given to petitioner at the protest review session provided that to challenge a model answer, the candidate was required to: (1) write the number of the relevant question; (2) "state the question"; and (3) explain why the answer provided by the candidate was "as good or better than the proposed [model] answer." Candidates could submit challenges to the answers at the session itself or within 30 days of it. Each candidate at the protest session was instructed that, prior to leaving the session, "[y]ou must turn in all of the examination material, your protests, your scrap paper, the proposed answer key, and any notes you may have prepared."

According to petitioner, he reviewed the instructions regarding the manner in which answers must be challenged and the instructions requiring the candidates to turn in all exam materials prior to leaving the session, and perceived a contradiction between those two sets of instructions. Specifically, petitioner was confused as to how a candidate could

challenge an answer after leaving the session (but within the 30-day window provided by DCAS) when the candidate was required to "state the question" but apparently could not leave the session with the questions. Thus, if a candidate were precluded from leaving the session with the questions but required to state verbatim the question he or she wished to challenge, then the right to make challenges after the session would be difficult, if not impossible, to exercise. Petitioner therefore asked a proctor at the session whether the question had to be stated verbatim in a challenge to the question submitted after the session. The proctor allegedly told petitioner that regardless of whether the challenge was made during or after the session, the candidate was required to restate the question verbatim. Because petitioner wanted to challenge three questions after the session, he wrote those questions inside a reference book that he brought to, and was permitted to have at, the session.

Several weeks after the protest session (but within the 30-day period) petitioner mailed to DCAS his challenges to the three questions that he had written in his reference book. He also visited a web site on which civil servants discuss civil service exams and posted the questions on the site. Thereafter, in September 2006, DCAS released the eligibility list for the position of captain; petitioner ranked 13th on that list.

By notice dated December 8, 2006, DCAS informed petitioner

that, based on information gathered by the New York City Department of Investigation (DOI) regarding his challenges to the test questions, it was charging him with, among other things, violations of Civil Service Law § 50(11)(d) and (g)[1] because he wrote the questions in his reference book thereby taking them out of the protest session and posted the questions on the Internet. Under the "Preliminary Findings" section of the notice, DCAS advised petitioner that it had made the following preliminary findings:

> (1) [petitioner] engaged in the alleged conduct;
>
> (2) in engaging in th[e] conduct, [petitioner] violated ... Civil Service Law Section 50(11)(d), in that [he] had in [his] possession questions and answers relating to the administration of Exam 5535 without authorization from an appropriate authority, and, in fact, in direct violation of instructions provided to [him] in [his] invitation to attend the protest session and the Instructions to Candidate form [he] received at the protest session;

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[1]Civil Service Law § 50(11) lists unlawful acts with respect to examinations administered pursuant to the Civil Service Law. Paragraph (d) of that section proscribes an applicant from "[h]av[ing] in his or her possession any questions or answers relating to any such examination, or copies of such questions or answers, unless such possession is duly authorized by the appropriate authorities"; paragraph (g) states that an applicant may not "[d]isclose or transmit to any person the questions or answers to such examination prior to its administration, or destroy, falsify or conceal the records or results of such examination from the appropriate authorities to whom such records are required to be transmitted in accordance with this chapter, unless duly authorized to do so by the appropriate authorities."

> (3) in engaging in this conduct, [he] violated ... Civil Service Law Section 50(11)(g), in that [he] disclosed to persons the questions to Exam No. 5535 while [that exam] was continuing to be administered to candidates; ...
>
> (4) in engaging in this conduct, [he] violated Regulation E.16.1 of the GER's, in that [he] cheated on an examination.
>
> (5) these violations require that [he] be disqualified from participation in Exam No. 5535, Promotion to Captain, pursuant to Civil Service Law Section 50(11).

Petitioner, who had cooperated with DOI in its investigation, acknowledged readily that he had written the three questions in his reference book, left the protest session with the book, and used the questions to challenge the model answers to those questions. He also acknowledged posting the questions on the Internet. Petitioner explained, however, that he wrote the questions in his book because he wanted to comply with the instruction requiring a candidate to state verbatim the question he or she was challenging. He also explained that he posted the questions on the Internet because many members of the New York City Police Department post material related to civil service exams on the web site and none of the instructions he read prohibited doing so.

On June 4, 2007, DCAS issued its determination, concluding that petitioner violated Civil Service Law § 50(11)(d) and (g), nullifying petitioner's exam results, and deleting petitioner's

name from the eligibility list for promotion to the rank of captain. By letter dated August 14, 2007, the Deputy Commissioner of DCAS rejected petitioner's administrative appeal from the June 4, 2007 determination. Petitioner attempted to take a further administrative appeal to respondent CSC, but by a determination, dated November 20, 2007, CSC held that it did not have jurisdiction to consider the appeal. CSC stated that it "ha[d] conducted a review of the documents submitted by both sides and ... determined that [it] does not have the requisite jurisdiction to hear the ... appeal as it does not fall within the enumerated determinations set forth in City Charter 813 as reviewable by th[e] [CSC]." Thereafter, petitioner commenced the instant action pursuant to CPLR article 78 challenging CSC's determination. Supreme Court denied the petition, finding that CSC's interpretation of Charter § 813(d) was entitled to deference since it was neither irrational nor unreasonable.

Petitioner argues, among other things, that CSC's determination that it did not have jurisdiction to hear his appeal from DCAS's final determination was erroneous as a matter of law and that the matter should be remanded to CSC for consideration of his appeal. Respondents counter that CSC's determination as to whether it has jurisdiction to hear an appeal is entitled to great deference and should not be disturbed.

New York City Charter § 813(d) states:

> The civil service commission shall have the power to hear and determine appeals by any person aggrieved by any action or determination of the commissioner [of DCAS] made pursuant to paragraphs three, four, five, six, seven and eight of subdivision a or paragraph five of subdivision b of section eight hundred fourteen of this chapter and may affirm, modify, or reverse such action or determination.

City Charter § 814(a)(6), in turn, provides:

> The commissioner [of DCAS] shall have the following powers and duties ...:
>
> (6) To investigate applicants for positions in the civil service; to review their qualifications, and to revoke or rescind any certification or appointment by reason of the disqualification of the applicant or appointee under the provisions of the civil service law, and the rules of the commissioner or any other law.

Accordingly, CSC has jurisdiction over an appeal from any person aggrieved by a determination of DCAS revoking or rescinding any certification by reason of the disqualification of the person under the Civil Service Law.

Critical to the disposition of this appeal is whether CSC's determination dismissing petitioner's appeal for want of jurisdiction is entitled to deference. "Where interpretation of statutory terms [by an administrative agency] is involved, two standards of review are applicable" (*Matter of Teachers Ins. & Annuity Assn. of Am. v City of New York*, 82 NY2d 35, 41 [1993]). Thus,

> Where the interpretation of a statute or its

> application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute. If its interpretation is not irrational or unreasonable, it will be upheld. Where, however, the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight (*Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 [1980] [internal citation omitted]).

In ascertaining whether deference to an administrative agency's interpretation of a statute is entitled to deference, the court should focus on "the extent to which the interpretation relies upon the special competence the agency is presumed to have developed in its administration of the statute" (*Matter of Gruber [New York City Dept. Of Personnel - Sweeny]*, 89 NY2d 225, 231 [1996]) and the extent to which "the language used in the statute is special or technical and does not consist of common words of clear import" (*Matter of New York State Assn. of Life Underwriters v New York State Banking Dept.*, 83 NY2d 353, 360 [1994]).

Here, no deference should be accorded CSC's determination. The language used in City Charter § 813(d), above quoted, is plain and involves no special or technical words. Similarly,

City Charter § 814(a)(6) employs common words of clear import in vesting DCAS with the power "to revoke or rescind any certification ... by reason of the disqualification of the applicant ... under the provisions of the civil service law." Here too, interpretation does not depend in the slightest on the knowledge and understanding of the practices unique to CSC or that body's evaluation of factual data (*see Roberts v Tishman Speyer Props., L.P.*, 62 AD3d 71 [2009]). Rather, interpretation of these City Charter provisions requires "statutory reading and analysis, dependent only on accurate apprehension of legislative intent ..." (*Gruber*, 89 NY2d at 231-32). Therefore, "[we] need not accord any deference to the agency's determination, and [we are] free to ascertain the proper interpretation from the statutory language and legislative intent" (*id.*).

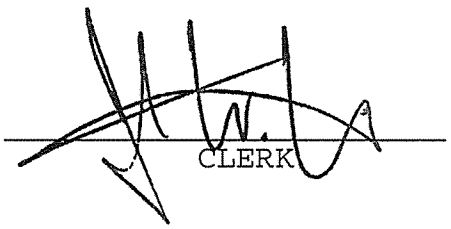
DCAS disqualified petitioner, an applicant for a promotion, from eligibility for the promotion by revoking his certification on the list of eligible applicants (*see* City Charter § 814[a][6]) and did so "under the provisions of the civil service law" (*id.*), namely Civil Service Law § 50(11). DCAS's determination therefore fell within the plain and ordinary meaning of City Charter § 814(a)(6), which provides DCAS with the power "to revoke or rescind any certification ... by reason of the disqualification of the applicant ... under the provisions of the civil service law." Because DCAS made a determination pursuant

to § 814(a)(6) that aggrieved petitioner, CSC has the power under § 813(d) to hear and determine his appeal, and may affirm, modify, or reverse that determination.[2]

In light of our conclusion that CSC erred in refusing to hear petitioner's appeal, we need not address petitioner's remaining contention.

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

ENTERED: OCTOBER 8, 2009



[2]Although not raised by the parties, it is worth noting that DCAS's Regulation E.16.1, codified at 55 RCNY 11-01(p) and made applicable to all examinations conducted by DCAS (55 RCNY 11-01[a][1]), which petitioner is also alleged to have violated, appears to provide an additional basis for CSC's jurisdiction.

Andrias, J.P., Catterson, Renwick, DeGrasse, Freedman, JJ.

845 American Transit Insurance Company, Index 111752/07
Plaintiff-Respondent-Appellant,

-against-

Arthur Brown,
Defendant-Appellant-Respondent,

Albertano Batista,
Defendant.

Blank & Star, PLLC, Brooklyn (Scott Star of counsel), for appellant-respondent.

Marjorie E. Bornes, New York, for respondent-appellant.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered November 10, 2008, which, to the extent appealed from, denied defendant Arthur Brown's motion for summary judgment on his counterclaim and plaintiff's cross motion for summary judgment declaring that it is not obligated to satisfy a default judgment obtained by Brown against defendant Albertano Batista, modified, on the law, to the extent of granting Brown's motion and declaring that plaintiff is obligated to satisfy the said judgment in the amount of $81,830, together with interest from July 19, 2007, and otherwise affirmed, without costs.

On November 12, 2002, Brown was involved in a motor vehicle accident with Batista, ATIC's insured. ATIC acknowledged receipt of Brown's third-party claim by letter dated January 28, 2003. Brown settled his claim for property damage with ATIC and

commenced a personal injury action against Batista on November 9, 2005. Brown forwarded copies of the summons and complaint to ATIC on or about January 26, 2006. These copies were mailed to ATIC at the address set forth in its January 2003 letter. Unbeknownst to Brown, however, ATIC had moved its offices in November 2003. Upon Batista's failure to appear in the action, Brown moved for a default judgment and proceeded to inquest on June 21, 2007. The underlying judgment in the amount of $81,830 was entered in favor of Brown against Batista on July 19, 2007. Pursuant to Insurance Law § 3420(a)(2), Brown served copies of the unsatisfied judgment with notices of entry upon ATIC and Batista on August 9, 2007. ATIC promptly issued a letter of disclaimer and commenced this declaratory judgment action on the ground that neither Batista nor Brown gave it timely notice of the underlying lawsuit as required by Batista's insurance policy. Supreme Court denied Brown's motion and ATIC's cross motion for summary judgment on the ground that additional discovery was needed. We find that Brown's motion should have been granted for reasons that follow.

ATIC asserts that Batista and Brown failed to immediately furnish it with copies of the underlying summons and complaint as required by the policy. ATIC does not cite any relevant policy provision in its brief or the affidavits it submitted below. Nevertheless, in its letter of disclaimer, ATIC quotes and relies

upon paragraph 11 of the policy's insuring agreements, which provides, in relevant part, that "[i]f any suit is brought against the Insured to recover such damages the Insured shall immediately forward to the Company every summons or other process served upon him." However, paragraph 11 follows paragraph 9, which provides that "[t]he following provisions . . . shall apply between the Company and the Insured but shall not prejudice the right of any person other than the Insured to recover hereunder." Therefore, under the terms of ATIC's policy, the failure to comply with the notice requirement does not preclude Brown's third-party claim under Batista's policy with ATIC.

In a proper case, the failure to satisfy a notice requirement "may allow an insurer to disclaim its duty to provide coverage" (*see American Tr. Ins. Co. v Sartor,* 3 NY3d 71, 76 [2004]). In this regard, ATIC asserts that Brown breached the policy's notice requirement by forwarding the summons and complaint to its former address instead of its then current address. A failure to satisfy an insurance policy's notice requirement does not vitiate coverage where there is a valid excuse (*cf. Matter of Allcity Ins. Co. [Jimenez]*, 78 NY2d 1054, 1055 [1991]). Brown has, in any event, demonstrated a valid excuse for forwarding the summons and complaint to ATIC's former address in that he was never notified of its change of address. Prior to the suit, ATIC's last correspondence to Brown set forth

the former address. ATIC's allegation that it had "sent out a post card to claimants and attorneys who had filed any claims against us during that time" rings hollow as it does not claim that any specific notification was sent to Brown or his counsel. Equally unavailing is ATIC's assertion that its new address was printed on a check forwarded to Brown's counsel in settlement of an unrelated matter. An address on a check alone does not suffice as notice that it is the address to which notices should be sent (*see Kennedy v Mossafa,* 100 NY2d 1, 10 [2003]). As noted above, we merely find that Brown has demonstrated a reasonable excuse for his failure to satisfy the policy's notice requirement. We disagree with the dissent's contention that this finding shifts a burden to ATIC.

All concur except Andrias, J.P. and Catterson, J. who dissent in a memorandum by Catterson, J. as follows:

CATTERSON, J. (dissenting)

I must respectfully dissent because there is no legal obligation for a defendant's insurer to notify a potential plaintiff or plaintiff's counsel of the insurer's change of address. Moreover, to put forth the lack of such notice as a valid excuse for the failure to notify the insurer of pending litigation ignores the reality that American Transit's address could have been verified on the Internet in approximately three-tenths of a second.

The undisputed facts of this case are as follows: On November 12, 2002, Arthur Brown, the plaintiff in the underlying action, was involved in a car accident with a vehicle owned and operated by Albertano Batista. Batista was insured by American Transit Insurance Company (hereinafter referred to as "ATIC"). Brown's counsel notified ATIC of his client's claim against Batista, and ATIC acknowledged Brown's claim in a letter dated January 28, 2003, and assigned a claim number. The letterhead and annexed forms bore an address of 275 Seventh Avenue, New York, NY 10001. Subsequently, ATIC conducted a property damage appraisal and settled the property damage portion of the claim.

Almost three years later, on or about November 9, 2005, Brown commenced an action against Batista in order to recover damages for personal injuries sustained in the accident. On January 26, 2006, Brown's counsel sent a courtesy copy of the

summons and complaint to ATIC instructing it to interpose an answer on behalf of its insured. The letter was sent to the Seventh Avenue address.

There was no reply or appearance by ATIC which, in fact, had moved two years earlier in November 2003 to offices on West 34th Street, Manhattan. On June 21, 2007, following an inquest, the court granted a default judgment in favor of Brown for $75,000. Judgment in the total amount of $81,830, including medical liens and interest, was entered against Batista on July 19, 2007. On August 9, 2007, Brown's counsel sent notice of entry of the judgment to ATIC at its current address on West 34th Street.

ATIC disclaimed coverage on the ground that it was not provided with timely notice of the lawsuit. ATIC then brought this declaratory judgment action alleging that neither Brown nor Batista complied with its policy requiring timely notice of commencement of an action against one of its insured. It stated that the first notification of the lawsuit was received after judgment was entered against Batista.

Supreme Court denied Brown's motion and ATIC's cross-motion for summary judgment on the ground that additional discovery was needed. In my opinion, the motion court erred in not granting summary judgment to ATIC.

On appeal, Brown argues that, because he sent the copy of the summons and complaint to ATIC, therefore ATIC must have

received it because letters sent through the United States Postal Service are "generally" not destroyed. Brown continues to hypothesize that in cases where a recipient has moved, the post office will return the mail to the sender with the intended recipient's new address. Without citation to any authority whatsoever, Brown then concludes that because he did not receive any such returned mail, there is a "clear presumption" that the mailing was received by ATIC. Wisely, Brown has a fallback position: namely, if ATIC did not receive the letter, it is because Brown sent it to the wrong address because ATIC did not notify him of the change of addresses.

The majority inexplicably accepts this latter position as a valid excuse and so determines that coverage is not vitiated in this case. Thus, without citing to any legal authority, the majority places the burden on the defendant's insurer to notify a potential plaintiff as to the correct address to which to send a copy of a summons and complaint years after it has moved to a different location. Further, the majority rejects ATIC's statements that it sent a mass mailing announcing the change of address at the time of the move, and that it notified the State Insurance Department and the post office of the change of address, and changed its address on its Web site and all phone listings. Instead, the majority makes clear that ATIC should have sent specific notification of the new address to Brown or

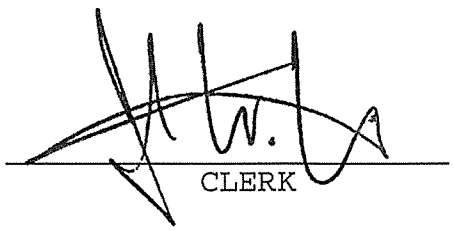
his counsel.

In my opinion, the majority has placed the burden on the wrong party. There is no legal obligation on ATIC to establish what sufficient efforts it made, if any, to notify a potential plaintiff of a change of address. Certainly, there is no legal authority whatsoever for the majority's demand that ATIC should have sent a specific notification to the counsel of a plaintiff whose property claim had been settled almost a year prior to ATIC's move to a new location.

In the absence of any legal authority for such a position, it appears the majority is willing to accept an attorney's lack of diligence in failing to spend three-tenths of a second to verify an address on the Internet as a valid excuse for the failure to satisfy an insurer's notice requirement. For the foregoing reasons, I believe that the motion court's order should be reversed and ATIC's motion for summary judgment should be granted.

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

ENTERED: OCTOBER 8, 2009



Mazzarelli, J.P., Friedman, Catterson, Renwick, Abdus-Salaam, JJ

1129 The People of the State of New York, Ind. 313/07
Respondent,

-against-

Noel Cortez,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Carol A. Zeldin of counsel), and Milbank, Tweed, Hadley & McCloy LLP, New York (Ateesh S. Chanda of counsel), for appellant.

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

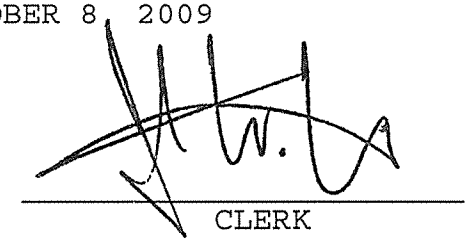
Judgment, Supreme Court, New York County (Robert Stolz, J.), rendered December 17, 2007, convicting defendant, upon his plea of guilty, of attempted burglary in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 12 years to life, unanimously modified, on the law, to the extent of vacating the persistent violent felony offender adjudication and sentence and remanding for resentencing, including the filing by the People of a proper predicate felony statement, and otherwise affirmed.

A period of time that was essential to toll the 10-year limit on the use of predicate convictions was set forth in the People's predicate felony statement, in pertinent part, as follows: "The ten-year period referred to in Penal Law § 70.06(1)(b)(v) is extended by defendant's incarceration at Downstate Correctional Facility *and Office of Mental Health and*

Hygiene from September 22, 1994 to June 20, 2001" (emphasis added). This was defective, because it failed to specify what portion of that time was actual incarceration, and what portion may have been psychiatric treatment by the Office of Mental Health and Hygiene that did not necessarily qualify as incarceration. The statement was facially defective in this respect, and defendant had no obligation to come forward with proof that he was not incarcerated during some part of the period in question.

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

ENTERED: OCTOBER 8, 2009



CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

1130 David Aviles, Index 16234/05
Plaintiff-Respondent,

-against-

2333 1st Corp.,
Defendant-Appellant.

Michelle S. Russo, Port Washington, for appellant.

Gugliotta & Associates, New Rochelle (John C. Gugliotta of counsel), for respondent.

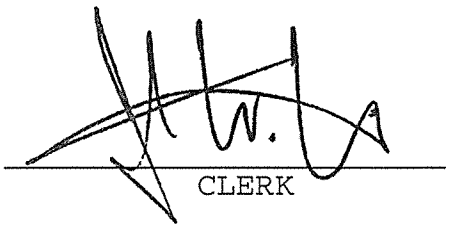
Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered March 10, 2009, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff does not contend that defendant created the alleged water hazard on the building's interior stairs that allegedly caused him to slip and fall, and defendant does not contest the existence of the hazard. Defendant's evidence established that it did not have actual notice of the hazard (*see Campanella v Marstan Pizza Corp.*, 280 AD2d 418, 418 [2001]). Furthermore, defendant described its usual cleaning procedures regarding the stairs, but did not indicate that such procedures were followed on the day of the accident. Defendant failed to show the last time the stairs were inspected before plaintiff fell, and thus there is a question of fact on whether defendant

had constructive notice of the complained of condition (*see Moser v BP/CG Ctr. I, LLC*, 56 AD3d 323, 324 [2008], citing, inter alia, *Baptiste v 1626 Meat Corp.*, 45 AD3d 259 [2007]).

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

ENTERED: OCTOBER 8, 2009



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Mazzarelli, J.P., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

1131 Leonard Simmons, Index 21270/03
Plaintiff-Respondent,

-against-

The New York City Transit Authority, et al.,
Defendants-Appellants.

Steve S. Efron, New York, for appellants.

Becker & Russo, P.C., New York (Ephrem J. Wertenteil of counsel), for respondent.

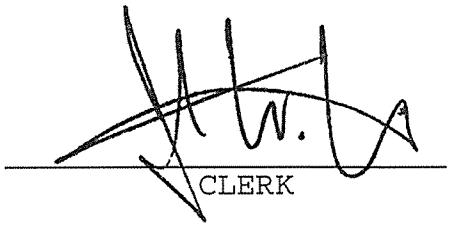
Judgment, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered January 30, 2008, after a jury trial, awarding damages for personal injuries and bringing up for review, inter alia, the denial of defendants' motion at the close of evidence for judgment as a matter of law, unanimously reversed, on the law, without costs, defendants' motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Plaintiff failed to make out a prima facie case of serious injury under either a quantitative or qualitative analysis (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]). Plaintiff's testimony indicated that he suffered relatively minor restrictions, such as a limited ability to play pool and lift heavy objects, which is insufficient to establish serious injury

absent an objective showing of restrictions (*see Toure* at 350-351; *Gaddy v Eyler*, 79 NY2d 955 [1992]; *Scheer v Koubek*, 70 NY2d 678 [1987]).

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

ENTERED: OCTOBER 8, 2009



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Mazzarelli, J.P., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

1132 In re Christian E.,

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

Kendra E.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

Susan Jacobs, Center for Family Representation, Inc., New York (Karen F. McGee of counsel), for appellant.

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

Lawyers for Children, New York (Ronnie Dane of counsel) , and Proskauer Rose LLP, New York (Anna G. Kaminska of counsel), Law Guardian.

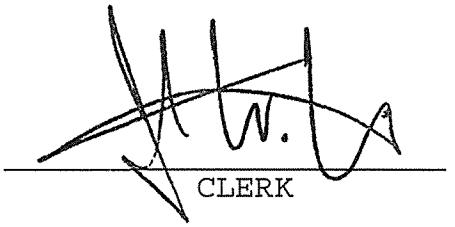
Order, Family Court, New York County (Sara P. Schechter, J.), entered on or about May 10, 2007, which denied respondent's CPLR 5015 motion to vacate a default finding made on November 13, 2006 that she had educationally neglected her child, unanimously affirmed, without costs.

Family Court providently exercised its discretion in denying respondent's motion to vacate her default (*see Matter of Jones*, 128 AD2d 403, 404 [1987]). Respondent failed to demonstrate both a reasonable excuse for her failure to appear and a meritorious defense (*see e.g. Matter of Crystal Antoinette C.*, 14 AD3d 436 [2005]; *Matter of Derrick T.*, 261 AD2d 108, 109 [1999]). Her scheduling of a follow-up medical appointment on November 13,

2006, a day on which she had to appear in court, was not a reasonable excuse for her default, and her conclusory allegations do not constitute a meritorious defense (*see e.g. Matter of Gloria Marie S.*, 55 AD3d 320, 321 [2008], *lv dismissed* 11 NY3d 909 [2009]; *Jones*, 128 AD2d at 404). Consequently, we do not reach her arguments as to the merits of the educational neglect finding, most of which, in any event, were unpreserved.

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

ENTERED: OCTOBER 8, 2009



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Mazzarelli, J.P., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

1134 The People of the State of New York, Ind. 3151/07
Respondent,

-against-

Donald Squires,
Defendant-Appellant.

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

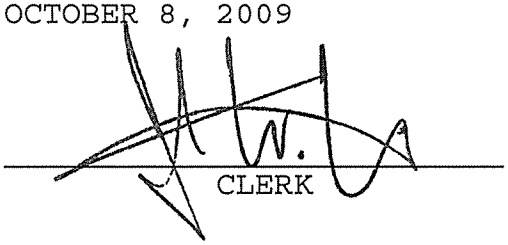
Robert M. Morgenthau, District Attorney, New York (Aaron Ginandes of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Daniel Conviser, J.), rendered on or about March 7, 2009,

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 8, 2009



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

Mazzarelli, J.P., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

1135 Luis Batista, Index 402078/06
Plaintiff-Respondent,

-against-

The New York City Transit Authority,
Defendant-Appellant.

Wallace D. Gossett, Brooklyn (Lawrence Heisler of counsel), for appellant.

Law Offices of Stuart M. Rissoff, Garden City (William R. Cohen of counsel), for respondent.

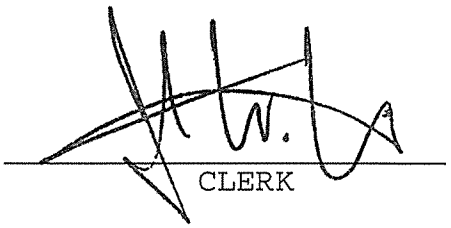
Order, Supreme Court, New York County (Donna M. Mills, J.), entered September 3, 2008, which, to the extent appealed from as limited by the brief, denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

The assertion of plaintiff's expert that there were defects in the staircase on which plaintiff fell is insufficient to raise an issue of fact as to proximate cause, because there is no

evidence connecting plaintiff's fall to those defects (*Kane v Estia Greek Rest.*, 4 AD3d 189 [2004]; *see also Telfeyan v City of New York*, 40 AD3d 372 [2007]).

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

ENTERED: OCTOBER 8, 2009



Mazzarelli, J.P., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

1136 The People of the State of New York, Ind. 6695/05
Respondent,

-against-

Paul Pacheco,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Michael C. Taglieri of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Jared Wolkowitz of counsel), for respondent.

Judgment, Supreme Court, New York County (Robert H. Straus, J.), rendered September 6, 2006, convicting defendant, after a jury trial, of burglary in the third degree and petit larceny, and sentencing him to an aggregate term of 1 year, unanimously affirmed.

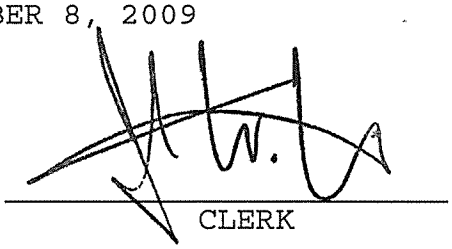
The court properly exercised its discretion in denying defendant's mistrial motion based on the prosecutor's alleged concealment of evidence. At the outset, we note that the evidence was neither exculpatory nor discoverable under CPL article 240. Defendant nevertheless claims that the prosecutor unfairly misled defense counsel into believing that certain evidence that would refute defendant's defense did not exist, and that the prosecutor failed to correct that misimpression in a timely fashion, thereby leading defense counsel to inadvertently elicit this damaging evidence on cross-examination. However, the

prosecutor made a timely disclosure of grand jury minutes from which this information could have readily been gleaned.

The trial court properly exercised its discretion in granting the prosecution's request for a missing witness charge. Defendant concedes that his sister would have offered material, noncumulative testimony about a critical issue and that she was within his control. The burden thus shifted to defendant to "account for the witness' absence or otherwise demonstrate that the charge would not be appropriate." (*People v Gonzalez*, 68 NY2d 424, 428 [1986]). Defendant did not establish that his sister was unavailable to testify (*see People v Savinon*, 100 NY2d 192, 198-200 [2003]), and the circumstances otherwise permitted an inference that her testimony would have been unhelpful to defendant.

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

ENTERED: OCTOBER 8, 2009



CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

1137 Bobby Santiago, Index 116940/04
Plaintiff-Appellant,

-against-

New York City Health and Hospitals Corporation,
Defendant-Respondent,

New York City Industrial Development Agency,
Defendant.

Finkelstein & Partners and Fine, Olin & Anderman, Newburgh (George A. Kohl, 2nd of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Deborah A. Brenner of counsel), for respondent.

Order, Supreme Court, New York County (Eileen Rakower, J.), entered August 15, 2008, which, to the extent appealed from, granted defendant New York City Health and Hospital Corporation's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Defendant failed to establish prima facie that it did not have constructive notice of the ice on the sidewalk in front of its property on which plaintiff allegedly slipped (*see Lewis v Metropolitan Transp. Auth.*, 99 AD2d 246, 249 [1984], *affd* 64 NY2d 670 [1984]). The climatological records submitted by defendant reflected that the last measurable snowfall occurred several days before the accident and that thereafter the temperature only rose above freezing, for a brief period, more than 24 hours before the

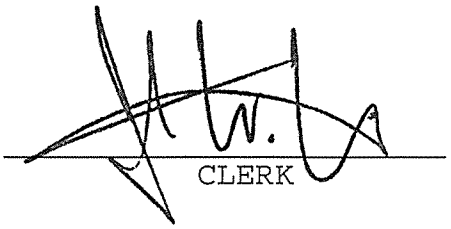
accident. The reasonable inference is that the ice formed after the temperature returned to freezing, more than 24 hours before the accident. However, while its employees testified as to defendant's snow and ice removal practice at the time of the accident, defendant kept no records of such removal, and its witnesses could not recall when, or whether, ice or snow had been removed in the days preceding the accident. Thus, the ice could have been there "so long that [defendant] is presumed to have seen it, or to have been negligent in failing to see it" (*id.* at 249-250 [internal quotation marks and citation omitted]; *see Wallace v Goodstein Mgt., LLC*, 48 AD3d 319 [2008]). As defendant failed to meet its initial burden, the motion should have been denied regardless of the sufficiency of plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Were we to find that defendant met its burden on the motion, we would find that plaintiff's submission of an expert meteorologist's opinion, based on meteorological data, that the ice condition was created at least 25 hours before the accident as a result of a thaw and refreeze cycle following the snowfall raised a triable issue of fact as to the origin of the ice patch

and the length of time it was there before the accident occurred (*see Gonzalez v American Oil Co.*, 42 AD3d 253 [2007]).

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

ENTERED: OCTOBER 8, 2009



Mazzarelli, J.P., Friedman, Catterson, Abdus-Salaam, JJ.

1138 Joseph A. Costabile, Index 570804/07
Plaintiff-Respondent, 259/02

-against-

Damon G. Douglas Company, et al.,
Defendants-Appellants,

City of New York, et al.,
Defendants.

[And Other Actions]

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Joel M. Simon of counsel), for appellants.

Mitchell Dranow, Mineola, for respondent.

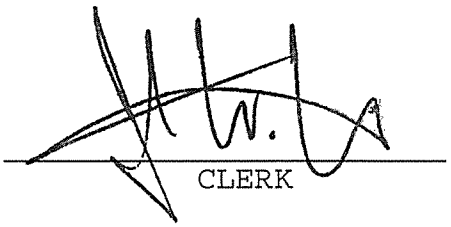
Order of the Appellate Term of the Supreme Court of the State of New York, First Department, entered December 18, 2008, which, to the extent appealed from as limited by the briefs, affirmed that portion of an order, Civil Court, Bronx County (Raul Cruz, J.), entered April 2, 2007, denying so much of the motion by defendants Damon G. Douglas Company (DGD) and Botanical Garden (BG) for summary judgment dismissing the remainder of plaintiff's claim based on violation of the Industrial Code, unanimously affirmed, without costs.

Plaintiff's supplemental bill of particulars, which specified the Industrial Code sections on which his Labor Law § 241(6) claim was based, was not prejudicial to defendants because it did not change the theory of liability.

A question of fact is presented as to whether the spot where plaintiff fell was covered by either paragraph of 12 NYCRR § 23-1.7(e), the Industrial Code provision invoked in the supplemental bill (*see Smith v Hines GS Props., Inc.*, 29 AD3d 433 [2006]).

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

ENTERED: OCTOBER 8, 2009



Mazzarelli, J.P., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

1141-
1141A-
1141B The People of the State of New York, Ind. 1431/05
Respondent, 2093/05
3265/05

-against-

Pablo Andino, also known as Edward Vasquez,
Defendant-Appellant.

Alireza Dilmaghani, New York, for appellant.

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

Judgments, Supreme Court, New York County (Gregory Carro, J.), rendered December 14, 2005, convicting defendant, upon his pleas of guilty, of criminal possession of stolen property in the third degree, perjury in the second degree, non-support of a child in the second degree, insurance fraud in the third degree, criminal possession of a controlled substance in the third degree and criminal possession of a weapon in the third degree, and sentencing him to an aggregate term of 3 to 7 years, unanimously affirmed.

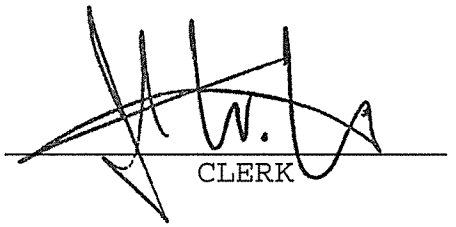
Since defendant did not move to withdraw his guilty plea, and since this case does not come within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662 [1988]), his challenge to the validity of the plea is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The record

establishes that defendant's plea was knowing, intelligent and voluntary, and there was nothing in the plea allocution that cast significant doubt on his guilt (*see People v Toxey*, 86 NY2d 725 [1995]).

To the extent defendant is arguing that his sentence is excessive, we reject that claim.

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

ENTERED: OCTOBER 8, 2009



Mazzarelli, J.P., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

1143 B. David Mehmet, Index 603859/07
Plaintiff-Appellant,

-against-

Add2Net, Inc., doing business as
Lunarpages.com, Inc.,
Defendant-Respondent.

B. David Mehmet, appellant pro se.

Rivkin Radler LLP, Uniondale (Melissa M. Murphy of counsel), for respondent.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered March 10, 2009, which granted defendant's motion to dismiss the amended complaint with prejudice, unanimously affirmed, with costs.

Plaintiff entered into a contract for defendant to provide, among other services, webhosting services for his website. Defendant's Services Agreement provided that plaintiff would make periodic payments, and noted that service could be interrupted in the event of late payment. The agreement incorporated by reference an Acceptable Use Policy (AUP) and provided that any breach of that policy would be grounds for suspension or termination of plaintiff's account. Under the AUP, plaintiff agreed "not to abuse whether verbally or physically or whether in person, via email or telephone or otherwise...any employee or contractor of [defendant]."

The agreement also provided that plaintiff's account could be suspended for, among other things, breach of "any term" of the agreement, and in the event of suspension, defendant retained the "option" of giving plaintiff an "opportunity to correct" the breaching condition giving rise to the suspension. Upon failure to cure the breach, the account may be terminated "after a period of suspension."

On November 11, 2007, plaintiff concededly breached the agreement by failing to timely pay website hosting fees. On the afternoon of Friday, November 16, plaintiff received a voice message from one of defendant's employees advising him that his "account is due to renew; but we have not received payment on it. So, to avoid any interruption to your service, please give me a call back." Plaintiff alleges that he promptly returned the call and left a voice message stating that he would be mailing the payment and that defendant would receive it no later than Tuesday, November 20, 2007.

On the morning of Monday, November 19, plaintiff learned that his website had been suspended and was non-functional. Plaintiff was distressed and left defendant an "angry" voice message, using an obscene word to threaten to sue defendant if his website was not reactivated. That afternoon, defendant's corporate secretary called plaintiff and informed him that, because of his "angry message," defendant would not reactivate

his website, and defendant would return any checks received from plaintiff. Plaintiff also alleges that, following the suspension, he repeatedly attempted to retrieve his website files, but that the links provided by defendant were not functional.

On November 30, 2007, defendant sent plaintiff a letter recapping the parties' dispute and advising him that his account had been suspended since November 19 because of the lack of payment and that defendant had decided to terminate plaintiff's account, effective December 5, 2007, because of the suspension and the violation of the AUP.

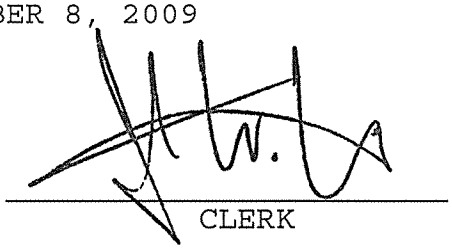
Presuming plaintiff's allegations to be true and according them the benefit of every possible inference (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]), plaintiff has failed to state a cause of action for breach of contract. Plaintiff concedes that he was in breach of the contract for failure to render timely payment. Plaintiff's argument that defendant waived the provisions of the agreement which required timely payment is raised for the first time on appeal, and we decline to consider it.

Plaintiff's appeal from the dismissal of his five other causes of action has been abandoned since he failed to address the claims in his brief (*see Batas v Prudential Ins. Co. of Am.*, 37 AD3d 320, 321 n 1 [2007]). To the extent that plaintiff

attempts to address these claims for the first time in his reply brief, they are also not entitled to consideration (*see Duane Morris LLP v Astor Holdings Inc.*, 61 AD3d 418, 419 [2009]). Were we to review these claims, we would find that they were properly dismissed by the motion court.

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

ENTERED: OCTOBER 8, 2009



CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

1144 Amran Niazi, et al., Index 602614/07
Plaintiffs-Appellants,

-against-

JP Morgan Chase Bank,
Defendant-Respondent.

Dasil E. Velez, Port Washington, for appellants.

Herrick, Feinstein LLP, New York (Mary Ellen Shuttleworth of counsel), for respondent.

Judgment, Supreme Court, New York County (Martin Shulman, J.), entered June 13, 2008, dismissing the complaint, and bringing up for review (1) an order, same court and Justice, entered June 5, 2008, which granted defendant's motion to dismiss the complaint upon documentary evidence, and (2) an order, same court and Justice, entered January 8, 2009, which, upon granting plaintiffs' motion to reargue and renew, adhered to the order of June 5, 2008, unanimously affirmed, with costs.

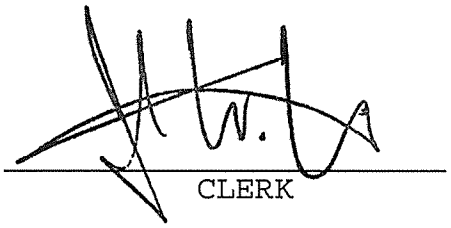
We deem the appeals from the above orders to be an appeal from the above judgment (CPLR 5501[a][1]; 5517[b]; *Matter of Aho*, 39 NY2d 241, 248 [1976]). The action involves defendant Chase's alleged improper draw down on a letter of credit obtained by plaintiff construction company Transcorp as a condition to Chase's extension of a construction loan to nonparty real estate developer Action II. The documentary evidence, i.e., the relevant loan documents, establishes that Action II defaulted on

the construction loan when it failed to repay, on their maturity date, the notes given to Chase for the loan. The loan documents further establish that Chase was not required to give Action II notice of its default on the notes and an opportunity to cure, or to give Transcorp or its president Niazi, who individually guaranteed the notes, notice of either Action II's default or of Chase's intent to draw down on the subject letter of credit, which partially secured payment of the notes. Moreover, it would not avail plaintiffs even if the loan documents did require Chase to give Action II notice of its default and an opportunity to cure. Plaintiffs' fraud claim, which alleges that Chase misrepresented to the issuer of the letter of credit that Action II was in default, impermissibly seeks future profits allegedly lost because, financially weakened by the draw down of the letter of credit, plaintiffs are unable to complete future jobs (*see MTI/Image Group v Fox Studios E.*, 262 AD2d 20, 22 [1999]); there is no merit to plaintiffs' claim that Chase owed them a fiduciary duty to notify them of Action II's default (*FAB Indus. v BNY Fin. Corp.*, 252 AD2d 367 [1998]); and any arguable benefit that plaintiffs may have received under the building loan agreement, which does not specifically identify Transcorp or Niazi as intended beneficiaries or imply that any third party has the power to enforce its provisions, was clearly incidental (*see Boyd v Hall, Ltd.*, 307 AD2d 624, 626-627 [2003]) and would not entitle

plaintiffs to any notice or opportunity to cure that Action II may have been entitled to under that agreement. Although the motion court noted, correctly, that the statements made in a dissolution proceeding initiated by Niazi against Action II are informal judicial admissions (*see Morgenthow & Latham v Bank of N.Y. Co.*, 305 AD2d 74, 79 [2003], *lv denied* 100 NY2d 512 [2003]), the motion court did not rely on these admissions, but rather based its decision, as we do, on the express language of the relevant loan documents.

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

ENTERED: OCTOBER 8, 2009



CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

1145 The People of the State of New York, Ind. 2066/01
Respondent,

-against-

Ivin Williams,
Defendant-Appellant.

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

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

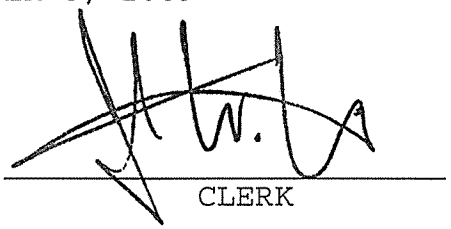
Judgment of resentence, Supreme Court, New York County, (Carol Berkman, J.), rendered November 19, 2008, resentencing defendant, as a second violent felony offender, to a term of 7 years with 5 years' post-release supervision, unanimously affirmed.

Defendant's challenges to his resentencing, which added a period of post-release supervision, are similar to arguments rejected by this Court in *People v Rodriguez* (60 AD3d 452 [2009]) and *People v Hernandez* (59 AD3d 180 [2009], *lv granted* 12 NY3d

817 [2009]), and we decline to revisit those decisions or reach a different result.

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

ENTERED: OCTOBER 8, 2009



CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

1146 The People of the State of New York, Ind. 4725/07
Respondent,

-against-

Jamiel Eddie,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered on or about March 14, 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.

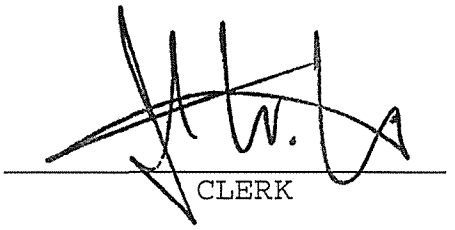
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department 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.

ENTERED: OCTOBER 8, 2009



CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

1148N Alan D. Glatt, Index 601590/07
Plaintiff-Appellant-Respondent,

-against-

Mariner Partners, Inc.,
Defendant-Respondent-Appellant,

William Michaelcheck,
Defendant.

Farrell Fritz, P.C., New York (Peter A. Mahler of counsel), for appellant-respondent.

Covington & Burling LLP, New York (C. William Phillips of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered February 20, 2009, which granted plaintiff's motion to amend the complaint to augment his existing breach of contract cause of action, but denied so much of the motion as sought leave to add a cause of action for breach of the implied covenant of good faith and fair dealing, unanimously modified, on the law, and the motion to amend the complaint to add new allegations on the breach of contract claim denied, without costs.

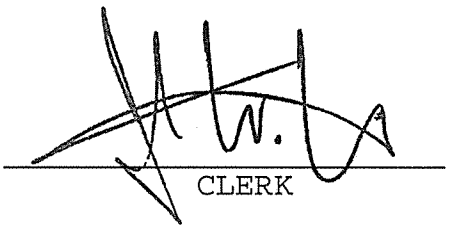
Plaintiff's failure to submit an affidavit of merit with his motion to amend cannot be remedied by an affidavit submitted for the first time in reply (*Schulte Ruth & Zabel, LLP v Kassover*, 28 AD3d 404, 405 [1st Dept. 2006]). Thus, the motion to amend should have been denied. Were we to consider the contents of the proposed affidavit, it is nonetheless insufficient to excuse the

long delay.

The cause of action for breach of the implied covenant of good faith and fair dealing was properly rejected as duplicative of so much of the breach of contract claim that this Court has already determined was dismissed for insufficiency (63 AD3d 428; *see Triton Partners v Prudential Sec.*, 301 AD2d 411 [2003]).

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

ENTERED: OCTOBER 8, 2009



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Friedman, J.P., McGuire, Moskowitz, Acosta, DeGrasse, JJ.

1266-
1267 Richard Chun, Index 102498/08
Plaintiff-Respondent,

-against-

Sook-Cha Kim,
Defendant-Appellant.

William R. Kutner, Rego Park, for appellant.

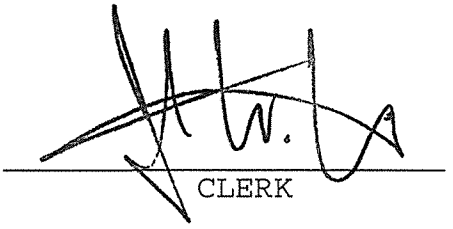
Siegel & Siegel, P.C., New York (Michael D. Siegel of counsel), for respondent.

Judgment, Supreme Court, New York County (Edward H. Lehner, J.), entered May 7, 2009, in favor of plaintiff and against defendant, and bringing up for review an order, same court and Justice, entered March 26, 2009, which granted plaintiff's motion for summary judgment, unanimously reversed, on the law, with costs, the judgment vacated, and the matter remanded for further proceedings. Appeal from the order unanimously dismissed, without costs, as subsumed in the appeal from the judgment. This action has been brought to seek repayment of a purported loan to defendant. It was error for Supreme Court to grant summary judgment in light of the fact that the affidavits of defendant and her daughter, accompanied by proof including copies

of cancelled checks, are sufficient to raise a triable factual issue as to whether the loan was actually made to the daughter.

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

ENTERED: OCTOBER 8, 2009



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
James M. Catterson
James M. McGuire
Karla Moskowitz
Rolando T. Acosta, JJ.

5358-5359-5359A
Index 107097/05
59104/07

Frank Osowski, et al.,
Plaintiffs,

-against-

AMEC Construction Management, Inc., et al.,
Defendants/Third-Party
Plaintiffs-Appellants,

-against-

DCM Erectors, Inc.,
Third-Party Defendant Respondent.

Third-Party plaintiffs appeal from a judgment of the Supreme Court, New York County (Jane Solomon, J.), entered July 21, 2008, inter alia, dismissing the third-party complaint, and from orders, same court and Justice, entered June 4, 2008 and June 23, 2008.

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

Mauro Goldberg & Lilling LLP, Great Neck (Kenneth Mauro, Matthew W. Naparty and Anthony F. DeStafano of counsel), for respondent.

CATTERSON, J.

This action arises out of an accident that occurred during the construction of the New York Times Building in Midtown Manhattan. On May 13, 2005, the plaintiff Frank Osowski was seriously injured when a four-ton steel beam fell on him while he was unloading a truck at the construction project. As a result of the accident, Osowski's left leg and multiple toes on his right foot were amputated.

Prior to commencing construction on the project, on January 22, 2004, the New York Times Building, LLC (hereinafter referred to as "NYTB"), the owner of the building, entered into an agreement with AMEC Construction Management Inc. (hereinafter referred to as "AMEC") for construction management services for the project. Thereafter, on February 23, 2005, AMEC entered into a subcontract with DCM Erectors, Inc. (hereinafter referred to as "DCM"), Osowski's employer, for structural steel work at the project.

Both AMEC and DCM were enrolled in the Owner Controlled Insurance Program (hereinafter referred to as "OCIP") that NYTB had procured and implemented for the project.[1] The OCIP

---

[1]"OCIPs were developed to make the insurance programs used primarily for construction projects more equitable, uniform and efficient. OCIPs eliminate the costs of overlapping coverage and delays caused by coverage or other disputes between the parties

provided, inter alia, commercial general liability insurance, workers' compensation and employers liability insurance, and excess insurance to NYTB, AMEC and all enrolled contractors, including DCM. The OCIP contained a waiver-of-subrogation provision which provided that "[t]he Owner and Contractor hereby waive all rights against each other and any of their Subcontractors [...] *as to claims and damages covered by insurance obtained by the Owner under its OCIP program* [...]" (emphasis added).

On May 19, 2005, Osowski and his wife commenced an action against NYTB/AMEC (hereinafter referred to as the "main action"). Nearly 2½ years later, on October 22, 2007, American International Speciality Lines Insurance Corp. (hereinafter referred to as "AIG"), the first-layer excess insurer, issued a written denial of coverage to AMEC/NYTB in the main action. Its ground for denial was that, inter alia, its excess policy excluded coverage for bodily injury arising out of the loading or unloading of a vehicle.

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involved in a project and, at the same time, protect all the contracting parties by bringing the risk of loss from the project within the insurance coverage of the OCIP." John Loveless, *Construction Insurance: Do You Only Get What You Pay For?* 78 APR N.Y. ST. B.J. 10, 10 (2006).

On November 21, 2007, following AIG's disclaimer of coverage, AMEC/NYTB commenced an action against DCM, for common-law contractual indemnification and contribution (hereinafter referred to as the "third-party action"). Notably, absent AIG's disclaimer of coverage, the third-party action would have been prohibited by the "waiver of subrogation" provision in the OCIP, as well as by the antisubrogation rule.

On December 3, 2007, AMEC/NYTB commenced an insurance coverage declaratory judgment action against AIG. DCM was permitted to intervene in the declaratory judgment action to challenge AIG's denial of coverage. Less than a month later, on January 9, 2008, the trial court granted the Osowskis' motion for summary judgment on the issue of AMEC/NYTB's liability under sections 240(1) and 241(6) of the Labor Law.

On May 20, 2008, during the damages trial in the main action, a "Confidential Settlement and Release Agreement" was made between the Osowskis, NYTB and AMEC. Pursuant to the agreement, AMEC and NYTB agreed to secure funding in the amount of $12 million payable to the Osowskis, as follows: (1) a $2 million payment from Travelers; and (2) a $10 million irrevocable, unconditional letter of credit. In exchange for the

$12 million settlement, the Osowskis released AMEC/NYTB from all claims relating to the events giving rise to the main action.

The following day, on May 21, 2008, counsel for the Osowskis announced, in open court, that the main action had been settled pursuant to a confidential settlement agreement with AMEC/NYTB. Immediately thereafter, DCM informed the court that DCM had not been made privy to the details of the settlement.

At that point, DCM was still a party to the two other actions involving the Osowski accident pending before the same court (i.e. the declaratory judgment action and the third-party action brought by AMEC/NYTB). The court, acknowledging the fact that DCM was preparing for a trial in the third-party action, inquired of AMEC/NYTB's counsel, Steve Palley, as to whose interests the confidentiality clause was designed to protect.[2] Palley responded, "I can fairly say that the confidentiality provision[s] are for the benefit of all parties involved to

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[2]The attorney assigned by Travelers, the primary liability insurer, to defend AMEC/NYTB in the Osowski matter was Steven Cohen. Steven Palley was retained additionally to represent the interest of AMEC/NYTB. Three attorneys from the firm of Shaub Ahmuty Citrin & Spratt, LLP were also present: (1) Timothy Capowski, Esq. was the "voice" for AIG relative to settlement discussions between AIG, AMEC/NYTB (Mr. Palley) and the plaintiffs (Kenneth Sacks, Esq.); (2) Robert Ortiz, Esq. was monitoring the trial on behalf of AIG; and (3) once settlement was reached with the plaintiffs, Steven Ahmuty, Jr., Esq. appeared on behalf of AIG to prosecute its third-party action as assignee of AMEC/NYTB.

offset the arguments we will have closing argument in front of the jury."

The proceeding concluded with counsel for DCM stating on the record that she intended to make an application for full disclosure of the settlement terms and conditions. The matter adjourned for trial in the third-party action on June 3, 2008.

In the meantime, on May 30, 2008, DCM moved to compel disclosure of the settlement agreement and all related documents. DCM asserted that without disclosure, neither DCM nor the court could determine whether the waiver of subrogation provisions were applicable, and thus, whether dismissal of the third-party action was required. DCM noted that it was unaware whether settlement had been made on behalf of one or both defendants (i.e., AMEC/NYTB and DCM), and whether the plaintiff had filed releases in favor of one, or both of them. DCM further noted that in the third-party action AMEC/NYTB would be required to demonstrate that the amount paid in settlement was reasonable. Finally, DCM asserted that statements or representations in the settlement agreement could impact on credibility issues at the time of trial.

On June 2, 2008, AMEC/NYTB filed a cross motion for a protective order barring the disclosure sought by DCM. AMEC/NYTB

asserted that DCM was not entitled to disclosure of the contents of the settlement agreement, except for the amount paid in settlement, which it represented was $12 million. AMEC/NYTB argued, inter alia, that since AIG had disclaimed coverage for claims in the main action, the waiver of subrogation provision did not bar AMEC/NYTB's third-party action against DCM seeking to recoup the settlement amounts in excess of the $2 million primary coverage.

Later that day, with both parties before it, the court reviewed the "Confidential Settlement and Release Agreement." Subsequently, the court directed AMEC/NYTB to turn over the agreement to counsel for DCM.

After reviewing the "Confidential Settlement and Release Agreement," DCM noted that the agreement stated only that AMEC/NYTB would "provide" the Osowskis with a $10 million letter of credit, but did not state that AMEC/NYTB would fund the letter of credit. DCM indicated to the court that the balance of the agreements must be disclosed because if it were determined that AIG was funding the settlement then the contractual waiver of subrogation provision would be triggered. The court found this argument persuasive.

On June 3rd, AMEC/NYTB was ordered to disclose the related settlement agreements. Thereupon, DCM learned the details of the related confidential "Settlement Agreement and Release" among AMEC, NYTB and AIG. DCM discovered that: (1) AIG agreed to provide AMEC/NYTB with an irrevocable letter of credit in the amount of $10 million designating the Osowskis as intended beneficiaries, (2) AMEC/NYTB agreed to dismiss the declaratory judgment action, with prejudice, and to release all claims and actions against AIG for any matters connected to the Osowski action (3) AMEC/NYTB agreed to assign to AIG any and all claims it had against any person or entity arising out of or in connection with the Osowski action, including but not limited to the claims in the third-party action[3] and (4) AMEC/NYTB agreed that settlement was without prejudice to AIG's disclaimer of coverage with respect to the third-party action, and that such disclaimer "remain[ed] in full force and effect."

Consequently, DCM made an oral motion to dismiss the third-party action. AMEC/NYTB's counsel objected to the oral motion, asserting that DCM's motion was one for summary judgment and thus, should be made on papers. The court then granted a

[3]It was expressly agreed that the rights conveyed to AIG by this latter provision represented an assignment, not subrogation.

continuance to June 5, 2008 for "an offer of proof in the trial."

After the parties reconvened on June 5, DCM made an offer to support its previously articulated motion to dismiss. DCM concluded that by virtue of the confidential settlement agreement and associated documents:

> "there was, in fact, insurance that covered the loss; that there has been a promise and payment of those damages and, therefore, based upon the provisions in the contract that are now in evidence, the waiver of subrogation provision bars completely the pursuit of the third-party claim against DCM."

AMEC/NYTB countered that AIG had not rescinded its disclaimer, and nothing in the confidential settlement agreement and associated documents stated or implied otherwise. AMEC/NYTB concluded, "it's [DCM's] position that this set of agreements constitutes insurance. We disagree."

The trial court dismissed the third-party complaint on the ground that NYTB had not sustained any damages that would trigger a common-law right of indemnification against DCM. The court interpreted the settlement documents as the legal equivalent of insurance because "[AMEC/NYTB] will [never] be out-of-pocket a penny." Thereafter, the trial court severed the third-party action from the main action, ordered the entry of a judgment dismissing AMEC/NYTB's third-party complaint, and dismissed DCM's breach of contract counterclaim as moot.

On appeal, AMEC/NYTB argues that the trial court abused its discretion in ordering disclosure of the confidential settlement agreements. Furthermore, AMEC/NYTB contend that AIG's disclaimer was not mooted by the confidential settlement agreements. AMEC/NYTB assert that since AIG disclaimed coverage for "claims and damages" in the main action as not "covered" under the AIG policy, the waiver of subrogation did not bar AMEC/NYTB's third-party indemnity action against DCM seeking to recoup settlement amounts in excess of Travelers' $2 million primary policy. Additionally, AMEC/NYTB argue that the trial court erred in entertaining DCM's oral application.

For the reasons set forth below, we find that AMEC/NYTB's assertions are without merit, and affirm the judgment.

Pursuant to CPLR 3101, it was proper for the trial court to compel disclosure of the "Confidential Settlement and Release Agreement" between the Osowskis and AMEC/NYTB/AIG, the "Letter of Credit," and the "Settlement and Release Agreement" between AMEC/NYTB and AIG because these agreements were "material and necessary" to the issues raised in the third-party action.

According to CPLR 3101(a), "full disclosure of all matter material and necessary in the prosecution or defense of an

action" is required. In Allen v. Crowell-Collier Publ. Co. (21 N.Y.2d 403, 288 N.Y.S.2d 449, 235 N.E.2d 430 (1968)), the Court of Appeals interpreted the CPLR phrase "material and necessary" to mean nothing more or less than "relevant." Id. at 407, 288 N.Y.S.2d at 453. The Court stated that the phrase must be "interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" Id. at 406, 288 N.Y.S.2d at 452. The Court concluded that the "test is one of usefulness and reason." Id. Thus, disclosure of the terms of a settlement agreement by a settling party to a nonsettling party may be appropriate, despite the presence of a confidentiality clause in the agreement, where the terms of the agreement are "material and necessary" to the nonsettling party's case. Masterwear Corp. v. Bernard, 298 A.D.2d 249, 250, 750 N.Y.S.2d 5, 6 (1st Dept. 2002); see Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3101:18a ("[t]he central inquiry in resolving [...] disclosure requests [regarding settlement agreements] should focus on relevance").

There can be no question that in the instant case, the

confidential settlement materials were properly ordered to be disclosed. The third-party action was based on a premise that AMEC/NYTB were "passively negligent" tortfeasors whose payment to the Osowskis in the underlying suit entitled them to seek indemnification from DCM, the subcontractor alleged to have control of the work giving rise to Osowski's injury. Thus, the question of who funded the settlement of the main action was critical to whether AMEC/NYTB could continue to maintain the third-party action. In other words, if AMEC/NYTB's alleged losses were not "out-of-pocket," no suit could be maintained for common-law or contractual indemnification, either by AMEC/NYTB or by AIG as its assignee.

AMEC/NYTB's reliance on Matter of New York County Data Entry Worker Prod. Liab. Litig. (162 Misc 2d 263 (Sup. Ct. N.Y. County 1994), aff'd, 222 A.D.2d 381, 635 N.Y.S.2d 641 (1st Dept 1995)) is misplaced. That case involved a repetitive stress injury action against multiple defendants involving multiple claims of contribution. This Court found that the nonsettling defendants were not entitled to discover the terms of confidential settlement agreements entered into between the plaintiffs and the codefendants, because the terms of agreement were not material to the resolution of the issues involved in the case. Specifically, we concluded that other than the amount of settlement, a

confidential settlement between the plaintiff and the codefendants had no relevance to a possible post verdict apportionment under General Obligations Law 15-108. 222 AD2d at 382, 635 N.Y.S.2d at 641. Here, however, the settlement of the main action directly bears on the underlying issue of fault and damages since the third-party action was one for *indemnification* and was necessarily predicated on the fact that AMEC/NYTB was "out-of-pocket" for a loss which should have been borne by DCM.

Furthermore, we find that the trial court did not abuse its discretion in entertaining DCM's oral motion to dismiss. There is no per se rule against oral motions, so long as a movant makes a proper evidentiary showing. See e.g. Rosado v. Proctor & Schwartz, 66 N.Y.2d 21, 494 N.Y.S.2d 851, 484 N.E.2d 1354 (1985) (affirming order which granted third-party defendant's oral application, on the eve of trial, to dismiss indemnification claim)). Indeed, the motion was made on an evidentiary record sufficient for a determination, and defendants/third-party plaintiffs had ample notice and opportunity to respond to it. Since the motion was prompted by revelation of the terms of the settlement that had been reached in the main action, defendants/third-party plaintiffs cannot claim to be surprised by it.

Moreover, we find that the trial court's ruling on the

motion was correct. In funding the $10 million for the letter of credit, AIG effectively paid on the policy on which it had disclaimed. As a result, it foreclosed any claims AMEC/NYTB could have pursued against DCM in any third-party action because AMEC/NYTB were not out of pocket in connection with the settlement. Thus, AMEC/NYTB had no claims left to pursue or to assign to any other party, least of all to AIG since the effective payment on the policy triggered the waiver of subrogation clause.

The fact that the confidential agreement between AMEC/NYTB and AIG purported to keep AIG's disclaimer alive by stating that the disclaimer remained "in full force and effect" is irrelevant. The only possible way that AIG's disclaimer could have remained "in full force and effect" was if AIG and AMEC/NYTB had executed a reservation of rights agreement whereby AIG agreed to fund the $10 million in order to cap the damages but that, if a subsequent action determined that its disclaimer was indeed valid, then AMEC/NYTB would owe that amount to AIG. In that situation, AMEC/NYTB would be in a position to bring the third-party action against DCM, or even to assign its claim. Quizzed on this very point at oral argument, AIG conceded that no such explicit reservation of rights agreement was in place.

Indeed, the fiction of the disclaimer was belied by AIG's

funding of the $10 million letter of credit on condition that AMEC/NYTB agreed not to pursue its declaratory judgment action against AIG. In other words, both AMEC/NYTB and AIG stipulated away the possibility of adjudicating the validity of the disclaimer. Thus, they created a situation where AMEC/NYTB could never find itself in a position of owing the $10 million to AIG, and thus would never be in a position to pursue its action against DCM or to assign its claim to AIG. Indeed, as DCM asserts, the fiction of the disclaimer was nothing more than an attempt to circumvent the waiver of subrogation clause and thus AMEC/NYTB's contractual obligation. As such, AIG's arguments against disclosure of the agreement between it and AMEC/NYTB cannot be viewed as anything but a clear attempt to perpetrate a fraud on the court.

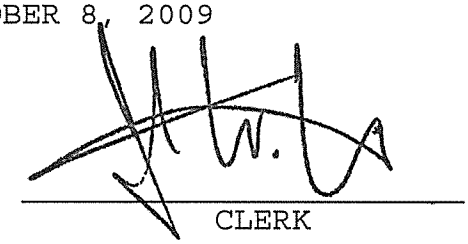
Moreover, counsel for AIG appears to have acted in disregard of well-established discovery rules and demonstrated a lack of forthrightness and candor to the court by failing to come forward with the terms of the settlement agreement which directly concerned DCM's defense in the third-party action. We believe that counsel's continued prosecution of the third-party action against DCM after AMEC/NYTB entered into the settlement agreements raises substantial questions under the Code of Professional Responsibility.

Accordingly, the judgment of the Supreme Court, New York County (Jane Solomon, J.), entered July 21, 2008, inter alia, dismissing the third-party complaint, should be affirmed, with costs. The appeals from the orders of the same court and Justice, entered June 4, 2008 and June 23, 2008, respectively, should be dismissed, without costs, as subsumed in the appeal from the judgment. The Clerk is directed to refer the matter of the conduct of Steven Ahmuty Jr., Esq. to the Departmental Disciplinary Committee.

All concur.

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

ENTERED: OCTOBER 8, 2009



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