SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 20, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Andrias, Catterson, Acosta, Abdus-Salaam, JJ.

1021 Do Gooder Productions, Inc., Index 604135/04
Plaintiff-Appellant,

-against-

American Jewish Theatre, Inc.,
Defendant,

Stanley Brechner,
Defendant-Respondent.

O'Melveny & Myers LLP, New York (Shannon Griffin of counsel), for appellant.

Adam L. Goldberg, Brooklyn, for respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered May 5, 2008, which denied plaintiff's motion for summary judgment or, alternatively, discovery sanctions against defendant Brechner, and granted Brechner's motion for summary judgment dismissing the complaint and all claims asserted against him, unanimously affirmed, without costs.

This is an action for breach of a 1998 license agreement for use of theatre space. There was insufficient evidence to warrant piercing defendant Theatre's corporate veil for the purpose of holding the individual defendant personally liable. Plaintiff

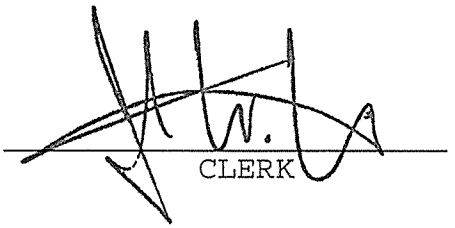
failed to meet its "heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences" (*TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]). Specifically, plaintiff failed to demonstrate the individual defendant's exercise of complete dominion over the corporation regarding the transaction attacked, with such control used to commit a fraud or wrong resulting in plaintiff's injury (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). There was no evidence that the corporation was undercapitalized at the time of the license agreement or that it failed to utilize the requisite corporate form. Evidence was also insufficient to prove Brechner's wrongdoing in utilizing corporate funds for his personal use or in commingling funds.

The court properly denied plaintiff's alternative request for imposition of sanctions based on delay in production of evidence or spoliation resulting from the bank's destruction of records in accordance with its seven-year record retention procedures, finding that most of the delay was the result of plaintiff not commencing the action until more than five years after it vacated the space and the time given plaintiff to obtain

new counsel. There was no showing that Brechner had not substantially complied with disclosure.

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

ENTERED: OCTOBER 20, 2009



Gonzalez, P.J., Andrias, Catterson, Acosta, Abdus-Salaam, JJ.

1036 Marilyn Feuer, Index 117698/05
Plaintiff-Respondent,

-against-

24-7 Gym, LLC,
Defendant-Appellant.

[And a Third-Party Action]

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Emily Jane Goodman, J.), entered on or about March 2, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto entered October 8, 2009,

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

ENTERED: OCTOBER 20, 2009

CLERK

Gonzalez, P.J., Friedman, Moskowitz, Renwick, DeGrasse, JJ.

1190N Kyung Sik Kim, et al., Index 104392/09
Plaintiffs-Appellants,

-against-

Idylwood, N.Y., LLC,
Defendant-Respondent.

Stephen Latzman, New York, for appellants.

Seyfarth Shaw LLP, New York (Jerry A. Montag of counsel), for respondent.

Order, Supreme Court, New York County (Michael Stallman, J.), entered on or about March 31, 2009, which denied plaintiffs' application for a preliminary injunction enjoining defendant from terminating a commercial lease and for a temporary restraining order tolling the applicable cure period, unanimously affirmed, without costs.

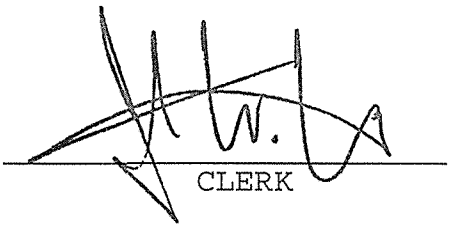
The motion court found, after a hearing, that plaintiffs had not previously and continuously maintained insurance coverage as required by their commercial lease. This violation was a material breach of the lease (*see C & N Camera & Elec. v Farmore Realty*, 178 AD2d 310, 311 [1991]) and, in these circumstances, an incurable violation that is an independent basis for the denial of *Yellowstone* relief (*see Grenadeir Parking Corp. v Landmark Assocs.*, 294 AD2d 313, 314 [2002], *lv denied* 99 NY2d 553 [2002]; *Zona, Inc. v Soho Centrale LLC*, 270 AD2d 12, 14 [2000]). Plaintiffs' attempt to demonstrate their ability and readiness to

cure the alleged violation by procuring, during the cure period, insurance coverage prospectively for the remaining 10 months of their lease term is unavailing, as such policy does not protect defendant against the unknown universe of any claims arising during the period of no insurance coverage.

We have considered plaintiffs' remaining arguments and, in light of our determination that the failure to maintain insurance coverage was an incurable violation, need not address them.

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

ENTERED: OCTOBER 20, 2009



Andrias, J.P., Friedman, Acosta, Nardelli, Renwick, JJ.

43 Joan Orphan, Index 15165/02
Plaintiff-Appellant,

-against-

Samuel Pilnik, M.D., et al.,
Defendants-Respondents,

Melvin Weinstein, M.D.,
Defendant.

Stephen H. Weiner, New York, for appellant.

Martin Clearwater & Bell LLP, New York (Ellen B. Fishman of counsel), for respondents.

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered December 24, 2007, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the cause of action alleging lack of informed consent as against defendants Samuel Pilnik, M.D. and Lenox Hill Hospital, affirmed, without costs.

Plaintiff claims that because she was not told that the procedure would result in a 6.5 centimeter scar, she did not give her informed consent to the removal of what turned out to be a benign lump in her right breast.

In support of their motion for summary judgment, defendants presented uncontradicted evidence that, after plaintiff went to her personal physician, Dr. Melvin Weinstein, complaining of a painful lump in her right breast, a mammogram and ultrasound

study were performed and Dr. Weinstein recommended that plaintiff see Dr. Pilnik, a specialist in breast surgery. After a manual examination of the breast, Dr. Pilnik recommended and, with plaintiff's consent, performed a fine needle aspiration, which withdrew cells for pathological analysis. The pathologist diagnosed the right breast as "suspicious for carcinoma; suggestively lobular in a background of proliferative breast lesion," and recommended excision. It is also undisputed that before the suspicious lesion was removed, plaintiff signed a consent form authorizing Dr. Pilnik to perform a surgical procedure "for the removal of a nodule in right breast upper outer quadrant," in which plaintiff stated that the purpose of the procedure, its expected benefits, possible complications and risks, as well as possible alternatives, had been explained and that all of her questions had been answered fully and satisfactorily.

In opposition to defendants' motion for summary judgment, plaintiff flatly denied Dr. Pilnik's assertion that he informed plaintiff of the risks involved, including scarring. She further stated that she told Dr. Pilnik that she wanted a second opinion and asked whether the procedure would leave a mark on her breast. According to plaintiff, Dr. Pilnik responded: "No. You are getting hysterical; this is a routine procedure and they do thousands at Lenox Hill Hospital." Plaintiff also claimed that

Dr. Weinstein told her, "[Y]ou have to do it," and that "a punch shot biopsy is no big deal, there would be no cuts or anything visible." In sum, plaintiff claims that she was led to believe that she was entering Lenox Hill for a biopsy and not a lumpectomy and that she was assured by all the doctors that there would be no cut or scar.

To establish a prima facie case of failure to procure informed consent to a medical procedure, a plaintiff must show that the doctor failed to disclose a reasonably foreseeable risk; that a reasonable person, informed of the risk, would have opted against the procedure; that the plaintiff sustained an actual injury; and that the procedure was the proximate cause of that injury (Public Health Law § 2805-d(1)(3); *Messina v Matarasso*, 284 AD2d 32, 34 [2001]; *Eppel v Fredericks*, 203 AD2d 152, 153 [1994]). As set forth above, defendants demonstrated that plaintiff signed a consent form after being informed of the surgical procedure and the alternatives, as well as the reasonably foreseeable risks and benefits. Thus, it was incumbent upon plaintiff to adduce competent evidence sufficient to rebut defendants' prima facie showing (*see Polcari v Dottino*, 35 AD3d 190 [2006]).

While plaintiff's medical expert opined that, if plaintiff's statements are credible, it appears that she "was not informed properly of the invasive procedure," and that "the surgical scar

appears to be excessively large (6.5 cm) in relation to the small area of concern and the tissue that was ultimately removed (2 cm)," neither he nor plaintiff allege, let alone offer any evidence, that a reasonable person, having been told that she had a suspicious and possibly cancerous lesion in her breast, would not have undergone the procedure recommended by Dr. Pilnik, even if she was told that it would leave a 6.5 centimeter scar. Thus, in the absence of any evidence sufficient to raise a triable question of fact regarding that necessary element, the motion court correctly granted Dr. Pilnik summary judgment dismissing the complaint against him (*see DeCintio v Lawrence Hosp.*, 33 AD3d 329 [2006]).

Dismissal of the action as against respondent Lenox Hill Hospital was likewise correct inasmuch as a hospital is not vicariously liable either for the acts of a private attending physician or for the act of a resident who followed the instructions of the attending physician (*see Walter v Betancourt*, 283 AD2d 223, 224 [2001]).

All concur except Acosta and Renwick, JJ. who dissent in part in a memorandum by Renwick, J. as follows:

RENWICK, J. (dissenting in part)

Plaintiff commenced this action alleging injury due to medical malpractice based on negligence and medical malpractice based on lack of informed consent after a breast biopsy to determine whether she had breast cancer left a scar on her right breast. Dr. Samuel Pilnik, a breast surgeon, performed the biopsy at Lenox Hill Hospital. Supreme Court granted summary judgment to all defendants and dismissed the entire action. The dismissal of the lack of informed consent claim against Pilnik and Lenox Hill is the sole issue on appeal. I would reverse that part of the order that dismissed the lack of informed consent claim against Pilnik. Accordingly, I respectfully dissent.

The relevant facts are as follows: The deposition testimony of the parties establishes that in November 1999, the then 41-year-old plaintiff, an exotic dancer, visited her primary care physician, Dr. Melvin Weinstein, complaining of a painful lump in her breast. During the examination, Weinstein felt a tender mass in the lateral aspect of plaintiff's right breast and referred her for a mammogram. The mammogram revealed a "palpable abnormality" in the "posterior right breast in the 10 o'clock region" and further evaluation by ultrasound was recommended. An ultrasound study of her right breast revealed a "sonographically normal breast parenchymal tissue" with "[n]o sonographic evidence of a discrete solid or cystic abnormality in the area of the

palpable lump in the right upper, outer breast," and it was recommended that further management be based on "clinical grounds."

Nevertheless, believing that breast cancer could not be ruled out because the mass remained palpable, painful and distinct from the surrounding breast tissue, Weinstein advised plaintiff to see a breast specialist. Immediately, plaintiff visited Pilnik -- one of the doctors Weinstein had recommended. Pilnik examined her right breast, felt a lump, and took a biopsy by fine needle aspiration (FNA). A pathological analysis of the FNA tissue indicated a suspicious lesion. Upon receiving the results, Pilnik called plaintiff and recommended an excisional biopsy. She agreed. Pilnik made no other recommendations, explaining that the "other alternative" to the surgical biopsy was to do a "core biopsy," which he rejected because the instrument is a "little lighter, finer than that" and he did not believe that was an adequate test.

Plaintiff testified that Pilnik telephoned her about the results and informed her that she was scheduled for a biopsy at Lenox Hill on December 20, 1999 and should call Weinstein to arrange for pre-screening blood work. When she expressed concern about any further biopsy and said that she wanted a second opinion, Pilnik told her not to make "a big deal about it." Pilnik also told her that she would not have any scarring from

the biopsy. Plaintiff testified that when she told Weinstein that she did not want "any kind of marks on [her] breasts," Weinstein said that this was a "routine procedure" and she would not have a scar. He described the procedure as a "punch-shot biopsy" in which "they would stick a needle in the side of the breast, pull out a little tissue, and there would be no scar."

Pilnik performed the procedure at Lenox Hill. While he testified that he discussed the procedure with plaintiff before performing it, plaintiff denies speaking with Pilnik that morning.

Upon plaintiff's arrival at Lenox Hill, Dr. Alexa Lessow approached her with a consent form authorizing Pilnik to perform "the removal of a nodule in right breast upper outer quadrant." Plaintiff testified that she read the form, saw the phrase "excision of mass" and told Lessow that she was to have a "punch-shot biopsy," not an "excision." Lessow said, "It means the same thing" and plaintiff signed the consent form. At her deposition, plaintiff identified her signature on a copy of a consent form, but testified, "That's not the form. It said 'excision of mass.' That's what I remember it said."

The consent form, in addition to being at variance with plaintiff's testimony, does not spell out any risks of, or alternatives to, the procedure. It states that the risks and alternatives have been explained to the signer of the form. A

few days after the procedure, the bandage on plaintiff's right breast fell off, revealing a 6.5 centimeter scar.

Supreme Court found that defendants established their prima facie case for dismissal of the claim based on lack of informed consent by demonstrating that plaintiff signed a consent form after being informed of the surgical procedure and its attendant discomforts and risks. The court found that plaintiff failed to raise a triable issue of fact as to the necessary element whether a reasonable person, having been told that she had a suspicious lesion in her breast, would not have undergone the procedure:

> "The plaintiff has never stated that had she known that a scar of the nature of the one that she bears would be the result of the procedure performed that she would not have consented, but rather that had she been informed she would have sought a second opinion. Dr. Filardi's affirmation makes no mention of what a reasonable person in plaintiff's position would have done. This failure is fatal to the plaintiff's opposition of [*sic*] Dr. Pilnik's motion for summary judgment" (citing *Ericson v Palleschi*, 23 AD3d 608, 610 [2d Dept 2005]).

Plaintiff does not dispute that defendants made a prima facie showing of entitlement to summary judgment; rather, she asserts that her medical expert's affidavit, as well as her affidavit and deposition testimony, considered together, create triable issues of fact that preclude summary judgment on the issue of lack of informed consent. I agree with the majority

that dismissal of the action against Lenox Hill was appropriate because Pilnik was not an employee of the hospital but a private attending physician for whose acts the hospital is not vicariously liable (*Walter v Betancourt*, 283 AD2d 223, 224 [2001]). Nor is the hospital liable for the acts of its resident, Lessow, as the record shows that Lessow followed Pilnik's instructions (*id.*). However, I depart from the majority's conclusion that the dismissal of the lack of informed claim against Pilnik was also appropriate.

To recover for medical malpractice based upon a lack of informed consent, a plaintiff must prove that the physician providing the treatment or diagnosis failed to disclose "such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical . . . practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation" (Public Health Law § 2805-d[1]) and "that a reasonably prudent person in the patient's position would not have undergone the treatment or diagnosis if he had been fully informed and that the lack of informed consent is a proximate cause of the injury or condition for which recovery is sought" (Public Health Law § 2805-d[3]).

To prove the first element, i.e., that the information disclosed rendered the consent qualitatively insufficient, the

plaintiff is required to adduce expert medical testimony (CPLR § 4401-a). Plaintiff satisfied her burden of raising an issue of fact as to the first element by the submission of an affirmation by Dr. Dominic Filardi. Dr. Filardi stated that "how [plaintiff's] breast would have looked after the operation should have been properly described to her prior to" the operation. In addition, plaintiff testified that she only consented to a non-scarring, minimally invasive biopsy of her breast and that she was not apprised of the risk of significant scarring (*see Davis v Caldwell*, 54 NY2d 176, 182-183 [1981]).

Supreme Court found that plaintiff failed to raise an issue of fact as to the second element, that a reasonable person, having been told of the suspicious lesion in her breast, would not have undergone the recommended procedure if told that it would leave a large scar. I disagree.

Initially, it must be pointed out that the court erred when it found that plaintiff was required to adduce expert testimony on this issue and that the failure to do so was "fatal" to her case. The court relied exclusively upon Second Department precedent for this proposition. This Court, however, has consistently held that expert testimony is not necessary on the issue whether a reasonably prudent person, fully informed, would not have consented to the treatment (*see e.g. Andersen v Delaney*, 269 AD2d 193 [2000]; *Hardt v LaTrenda*, 251 AD2d 174 [1998]);

Osorio v Brauner, 242 AD2d 511 [1997], *lv denied*, 91 NY2d 813 [1998]).[1]

Supreme Court further erred in finding that plantiff failed to raise an issue of fact as to the second element because she never stated that she would not have undergone the recommended procedure if told that it would leave a large scar; she only said that she would have sought a "second opinion" if she had been properly informed. With this the majority concurs. I disagree. This finding misapprehends the nature of the evidence required to prove this element and, as a result, misstates plaintiff's burden in opposing a summary judgment motion. The test of whether a reasonably prudent person would have consented if appropriate information had been given is objective rather than subjective (*Marchione v State of New York*, 194 AD2d 851, 854 [1993]; *Dooley v Skodnek*, 138 AD2d 102 [1988]). Thus, while the patient's testimony as to what she would have done if informed is relevant, it is not determinative; there must also be evidence as to the risks associated with undergoing the treatment and those associated with forgoing it (*Dooley v Skodnek*, 138 AD2d 102, 106-107 [1988]; *Zeleznik v Jewish Chronic Disease Hosp.*, 47 AD2d 199 [1975]).

Here, according plaintiff, the nonmovant, all reasonable

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[1] The Third and Fourth Departments have adopted the view of this Court on the issue (see *Laribee v City of Rome*, 254 AD2d 805 [1998]; *Santilli v CHP, Inc.*, 274 AD2d 905 [2000]).

inferences in her favor, I find that taken together, her testimony that she would not have permitted the doctor to proceed with the excision biopsy without a second opinion, if she had been fully informed of the risks of significant scarring, and her expert's testimony that less invasive methods to diagnose the suspicious breast lesion were available, raise an issue of fact whether a reasonably prudent patient would not have had the excision biopsy if she had known the risks (*see e.g. Eppel v Fredericks*, 203 AD2d 152 [1994]; *Iazzetta v Vicenzi*, 200 AD2d 209 [1994]; *Alberti v St. John's Episcopal Hosp.-Smithtown*, 116 AD2d 612 [1986]).

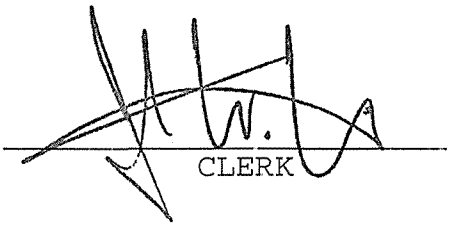
We cannot say as a matter of law that a reasonably prudent patient, newly diagnosed, fearful of "possible" cancer, and adamantly resistant to any scarring on her breasts, would have undergone the excision biopsy even if the significant risk of scarring and any alternatives or lack of alternatives to the biopsy had been disclosed to her.

Accordingly, defendants' motion for summary judgment dismissing the cause of action alleging lack of informed consent

as against defendant Samuel Pilnik, M.D. should have been denied.

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

ENTERED: OCTOBER 20, 2009



Tom, J.P., Mazzarelli, Nardelli, Catterson, Moskowitz, JJ.

122 Ari Kramer, as Executor of the Estate of Virginia Casey Bush, etc., Plaintiff-Appellant, Index 101978/05

-against-

Ioannis Danalis, Defendant-Respondent.

Haynes and Boone, LLP, New York (Kenneth J. Rubinstein of counsel), for appellant.

Schillinger & Finsterwald, LLP, White Plains (Peter Schillinger of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered October 2, 2008, which granted defendant's motion for partial summary judgment dismissing the second amended complaint except for the cause of action for an accounting and on his first counterclaim for a declaration that a 2002 agreement between himself and Irving T. Bush is valid, and denied plaintiff's application for distributions, unanimously modified, on the law, to deny defendant summary judgment dismissing the first, third, fourth, seventh and eighth causes of action in plaintiff's complaint, those claims reinstated to the extent they relate to matters other than the parties' respective ownership interests in the various properties at issue, and otherwise affirmed, without costs.

In opposition to defendant's showing that Irving T. Bush, an elderly real estate investor and attorney, was competent and

unaffected by undue influence when he and defendant executed the 2002 agreement, plaintiff failed to raise an issue of fact as to the existence of a fiduciary or confidential relationship between Bush and defendant and failed to carry his burden to demonstrate that the subject transaction was the product of undue influence (*see Sepulveda v Aviles*, 308 AD2d 1, 7-8 [2003]). In the face of affidavits and testimony from lay observers regarding Bush's continued independence as late as 2003 and from the attorney who negotiated, drafted and witnessed the execution of the 2002 agreement, plaintiff failed to submit contrary evidence of Bush's condition at the time (*see Preshaz v Przyziazniuk*, 51 AD3d 752 [2008]; *Matter of Camac*, 300 AD2d 11 [2002]). In addition, plaintiff's purported medical evidence, unsworn and, in one instance, unsigned, and apparently reflecting no more than a request by Bush's wife that he be examined rather than a conclusion by a physician, was inadmissible and therefore insufficient to defeat summary judgment (*see Henkin v Fast Times Taxi*, 307 AD2d 814 [2003]). The other evidence submitted by plaintiff on this issue was insufficiently probative. Plaintiff's claimed need for discovery was "an ineffectual mere hope, insufficient to forestall summary judgment," particularly in light of his failure to seek the deposition testimony of the attorney-drafter of whose identity and role he had long been

aware (*see Moran v Regency Sav. Bank, F.S.B.*, 20 AD3d 305, 306 [2005]).

To the extent that defendant sought summary judgment dismissing plaintiff's claims (except the cause of action for an accounting), the relief sought was expressly limited to the issue of the parties' respective interests in the various properties. Indeed, defendant failed to submit any evidence addressing the allegations in the complaint asserting that, even assuming the validity of the various agreements between the parties, defendant engaged in wrongful self-dealing. Accordingly, the first, third, fourth, seventh and eighth causes of action should not have been dismissed to the extent they relate to matters other than the parties' respective ownership interests in the various properties at issue, as those claims are viable in light of those allegations.

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

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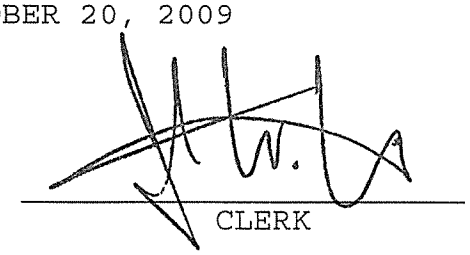
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 20, 2009



CLERK

Tom, J.P., Friedman, Catterson, Moskowitz, Richter, JJ.

865 Gwendolyn Ruffin, Index 101855/06
Plaintiff-Respondent,

-against-

The Chase Manhattan Bank, N.A., et al.,
Defendants-Appellants,

New York City Transit Authority, et al.,
Defendants.

Russo, Keane & Toner, LLP, New York (Kevin G. Horbatiuk of counsel), for appellants.

Akin & Smith, LLC, New York (Ismail S. Sekendiz of counsel), for respondent.

Order, Supreme Court, New York County (Donna M. Mills, J.), entered June 16, 2008, which, in an action for personal injuries sustained in a fall on a staircase, insofar as appealed from, denied defendants-appellants' motion for summary judgment dismissing the complaint as against them, affirmed, without costs.

Defendants' argument that they are entitled to summary judgment on the basis of plaintiff's deposition testimony that she does not know what caused her to fall places undue reliance on an isolated portion of plaintiff's testimony (*see Shechter v City of New York*, 17 AD3d 124, 124-125 [2005]; *Garcia v New York City Tr. Auth.*, 269 AD2d 142, 142-143 [2000]). Although plaintiff at her deposition at first testified that she did not know what caused her to fall, the transcript shows that she

immediately expressed the desire to clarify that response but was cut off by her examiner. Viewed as a whole, plaintiff's testimony, including the answers she gave to her own attorney's questions as well as other portions of her main examination, is entirely consistent with her affidavit in opposition, which states that she slipped because "the steps were not completely covered by non-skid material," that is, "on the portion of the step that was not covered by non-skid material." Given defendants' failure to rebut the affidavit of plaintiff's expert opining that this aspect of the stairs's design was not compliant with the Building Code of the City of New York, the motion for summary judgment was properly denied.

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

CATTERSON, J. (dissenting)

Because I believe that the plaintiff failed to provide any admissible evidence identifying the condition which caused her to fall, I respectfully dissent.

On May 3, 2005, the plaintiff, while descending the stairway leading from the lobby of 1 Chase Plaza to the subway station, slipped on the fourth step from the bottom and fell down the stairs. The plaintiff brought an action against The Chase Manhattan Bank, N.A. and JPMorgan Chase & Co., the New York City Transit Authority, the Metropolitan Transit Authority, and the City of New York to recover damages for the injuries she sustained.

On January 17, 2007, at the plaintiff's deposition, defense counsel asked the plaintiff: "Did you ever learn what caused you to slip and fall?" The plaintiff answered: "No. I don't." Defense counsel then asked: "Do you remember what foot you were stepping..." Whereupon, the plaintiff interrupted: "No, I don't. But I can come back to your question what really made me fall..." Defense counsel said: "No, I just want to know what foot you were stepping with."

After defense counsel concluded his questioning, the plaintiff's attorney showed her photographs and asked: "By looking at the pictures . . . what do you think *might* have caused you to slip?" (emphasis added). The plaintiff responded, over

defense counsel's objections, "I believe it was the shiny part on the stairs."

By notice dated January 22, 2008, the defendants moved for summary judgment dismissing the complaint. Citing the plaintiff's deposition testimony, the defendants argued that plaintiff's failure to identify what caused her to fall was fatal to her case.

The plaintiff opposed the motion, arguing that defendants' negligence in failing to have non-skid treads to fully cover the stairs constituted a dangerous condition. In support of her position, she submitted her deposition testimony which stated that she "believe[d] it was the shiny part on the stairs" that "might" have caused her to slip. Plaintiff also submitted an affidavit, dated May 9, 2008, wherein she attested that she was "caused to slip and fall on the fourth step from the bottom [...] due to the fact that the steps were not completely covered by non-skid material." The plaintiff further submitted the affidavit of a licensed professional engineer who asserted, inter alia, that the treads were not in compliance with section 27-375 of the Administrative Code of the City of New York.

The motion court denied the defendants' motion. The court reasoned that there were questions of fact as to whether the plaintiff was injured as a result of the condition of the subject steps.

For the reasons set forth below, I believe that the motion court erred in denying summary judgment dismissing the plaintiff's complaint in its entirety. It is well settled that in slip and fall cases a defendant is entitled to summary judgment as a matter of law when a plaintiff provides testimony at a deposition that he/she was unable to identify the cause of the accident. Reed v. Piran Realty Corp., 30 A.D.3d 319, 818 N.Y.S.2d.58(1st Dept. 2006), lv. denied, 8 N.Y.3d 801, 828 N.Y.S.2d 292, 861 N.E.2d 108 (2007); Kane v. Estia Greek Restaurant, Inc., 4 A.D.3d 189, 772 N.Y.S.2d 59 (1st Dept. 2004); Birman v. Birman, 8 A.D.3d 219, 777 N.Y.S.2d 310 (2nd Dept. 2004). While plaintiff's evidence need not positively exclude every possible cause of her fall other than alleged staircase defects, it must be sufficient to permit a finding of proximate cause based on logical inferences, not speculation. Schneider v. Kings Hwy. Hosp. Ctr., 67 N.Y.2d 743, 500 N.Y.S.2d 95, 490 N.E.2d 1221 (1986).

Here, I believe that the defendants demonstrated prima facie entitlement to judgment as a matter of law through the deposition testimony of the plaintiff that she was unable to identify the cause of the fall. Moreover, I do not believe that the plaintiff, in opposition to defendants' motion, produced any evidentiary proof sufficient to establish the existence of material issues of fact requiring a trial.

In my opinion, the motion court, in determining the existence of an issue of fact, improperly relied on plaintiff's deposition testimony that she "believe[d] it was the shiny part on the stairs" that "might" have caused her to slip. This testimony was solicited after the plaintiff told defense counsel that she wanted to "come back to your question what really made me fall." The defense attorney, of course, was not bound by any answers the plaintiff wanted to provide. It was the obligation of her attorney to subsequently ask her the same direct question. Instead, he phrased the question in a way ("what do you *think might* have caused you to slip?)(emphasis added)) that invited the plaintiff to speculate. Thus, her speculative answer was insufficient to raise an issue of fact.

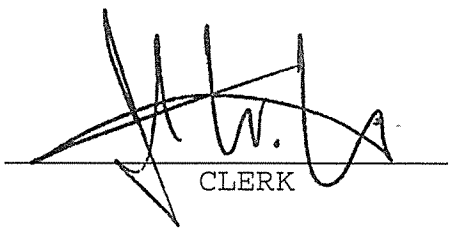
Further, the motion court improperly relied on the plaintiff's affidavit which, in my view, merely created a "feigned" issue of fact. This Court has found that "'[a] party's affidavit that contradicts [his or] her prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment.'" Pippo v. City of New York, 43 A.D.3d 303, 304, 842 N.Y.S.2d 367, 368 (1st Dept. 2007) quoting Harty v. Lenci, 294 A.D.2d 296, 298, 743 N.Y.S.2d 97, 98 (1st Dept. 2002). Here, the plaintiff unequivocally testified at her deposition that she did not know what caused her to fall. Thus, I would reject the plaintiff's

contradictory attestation, in an affidavit executed approximately four months after the defendants filed for summary judgment and approximately 16 months after her deposition, that she was caused to fall because the steps were not completely covered by non-skid material.

In the absence of any evidence connecting the alleged violation to the plaintiff's fall, I do not believe that any reasonable inferences as to causation can be drawn from plaintiff's expert's opinion that the staircase violated the New York City Administrative Code, creating an unsafe condition. See Reed, 30 A.D.3d at 320, 818 N.Y.S.2d at 59-60. Accordingly, I would grant summary judgment dismissing the complaint.

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

ENTERED: OCTOBER 20, 2009



Tom, J.P., Buckley, Catterson, Freedman, Abdus-Salaam, JJ.

1212 The People of the State of New York, Ind. 2020/07
Respondent,

-against-

Caprian Carter,
Defendant-Appellant.

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

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

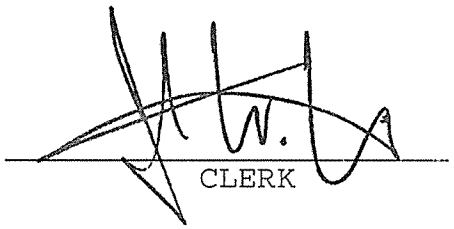
Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered December 4, 2007, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the fourth degree, and sentencing him, as a second felony drug offender whose prior conviction was a violent felony, to a term of 3½ years, unanimously affirmed.

The court properly denied defendant's motion to suppress identification testimony, without granting a hearing (*see e.g. People v Wharton*, 74 NY2d 921 [1989]). "The information presented to the motion court clearly established that viewing of defendant by the [undercover] officer in this [standard buy-and-bust] case was a confirmatory identification for which no *Wade*

hearing was required" (*People v Davis*, 289 AD2d 134, 135 [2001], *lv denied* 97 NY2d 753 [2002]).

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

ENTERED: OCTOBER 20, 2009



Tom, J.P., Buckley, Catterson, Freedman, Abdus-Salaam, JJ.

1213 Angela Soto, as Administratrix, Estate of Josefa Rivera, Deceased, Plaintiff-Appellant, Index 23216/98

-against-

Assisted Care Home Attendants Program, Defendant-Respondent,

Sandra Arriola, etc., Defendant.

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

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for respondent.

Order, Supreme Court, Bronx County (Cynthia S. Kern, J.), entered on or about July 9, 2008, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

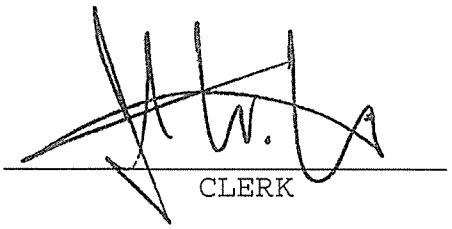
Plaintiff sued for injuries sustained by decedent when she fell out of bed due to the alleged negligence of her home health aide. Defendants were entitled to judgment when they established, through plaintiff's own deposition testimony, that plaintiff had no personal knowledge of the facts related to the injury (*see Rodriguez v Sixth President*, 4 AD3d 406 [2004]), thus relegating her theory to being proven only by speculation (*see Teplitskaya v 3096 Owners Corp.*, 289 AD2d 477 [2001]).

In any event, plaintiff's testimony was based on

inadmissible hearsay, rendering it insufficient to create a triable issue of fact (*see Narvaez v NYRAC*, 290 AD2d 400 [2002]). There is a notable exception to the hearsay exclusion rule for statements uttered under the stress of excitement, caused by an external event that "stills [the declarant']s reflective faculties," removing the opportunity for deliberation that might lead to untruthfulness (*People v Edwards*, 47 NY2d 493, 497 [1979]). Statements made by decedent and the home health aide, in a telephone call to plaintiff approximately 2½ hours after the fall, were precipitated by an event that was traumatic to both. However, in view of the fact that decedent was apparently conscious during this passage of time, she was capable of reflection by the time she spoke with her daughter on the telephone, thus eliminating the spontaneous nature of her declaration.

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

ENTERED: OCTOBER 20, 2009



CLERK

Tom, J.P., Buckley, Catterson, Freedman, Abdus-Salaam, JJ.

1214 The People of the State of New York, Ind. 3836/06
Respondent,

-against-

Nesto Romero,
Defendant-Appellant.

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

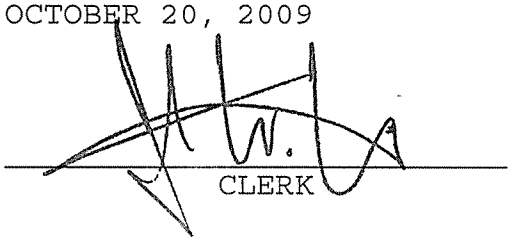
Robert M. Morgenthau, District Attorney, New York (Richard Nahas of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Corriero, J. at plea; Eduardo Padro, J. at sentence), rendered on or about June 6, 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 20, 2009



CLERK

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

Tom, J.P., Buckley, Catterson, Freedman, Abdus-Salaam, JJ.

1215 Joseph Damone, Individually and as Trustee of the Joseph A. San Filippo Generation Skipping Trust, Plaintiff-Respondent,

-against-

Joel Levy, Defendant,

Jerry Rosenband, Defendant-Appellant.

[And a Third-Party Action]

Index 104885/05
57113/05

Milber Makris Plousadis & Seiden, LLP, Woodbury (Lorin A. Donnelly of counsel), for appellant.

Tarter Krinsky & Drogin LLP, New York (Debra Bodian Bernstein of counsel), for respondent.

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered April 16, 2009, which, to the extent appealed from, denied defendant Jerry Rosenband's motion for summary judgment dismissing the complaint as against him, unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment in favor of Rosenband dismissing the complaint as against him.

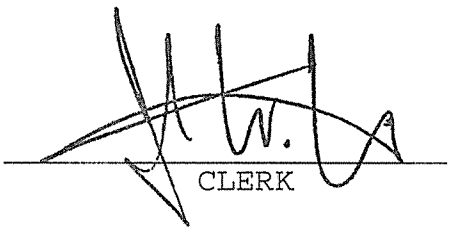
In opposition to Rosenband's prima facie showing that he was not retained on behalf of the trust or of the estate to prepare and file the estate tax returns due in December 2001, the testimony of both plaintiff and the nonparty executrix of the estate as to when and by whom Rosenband allegedly was hired to

prepare the tax return or to assist defendant Levy in preparing the return was too vague to raise an issue of fact.

In any event, the record demonstrates that it was plaintiff's recalcitrance in providing the information necessary for the filing of the estate tax return, and not Rosenband's actions, that was the proximate cause of the late filing and any resultant penalties or damages.

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

ENTERED: OCTOBER 20, 2009



Tom, J.P., Buckley, Catterson, Freedman, Abdus-Salaam, JJ.

1216 Leonari Jones, an Infant by Her Mother and Natural Guardian, Barry Alicea, et al., Plaintiffs-Respondents,

-against-

New York City Transit Authority, Defendant-Appellant. Index 20150/03

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

DeSimone, Aviles, Shorter & Oxamendi, LLP, New York (Dara L. Warren of counsel), for respondents.

Judgment, Supreme Court, Bronx County (Lucy Billings, J.), entered on July 1, 2008, inter alia, after a jury trial on the issue of damages, awarding infant plaintiff $1.5 million for past pain and suffering, $1.5 million for future pain and suffering and $110,783 over four years for future medical expenses, upon plaintiff's stipulation, in lieu of a new trial on future medical expenses, to reduce that award from $133,000 to $110,783, unanimously affirmed, without costs.

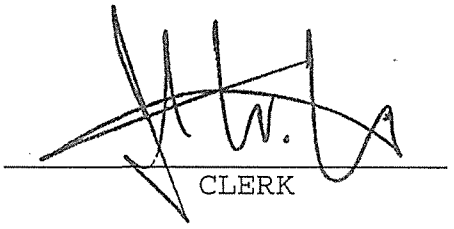
Infant plaintiff was injured when, while attempting to exit defendant's train, the door closed on her right foot and she was dragged along the length of the platform as the train departed from the station. As a result of the accident, infant plaintiff, who was 10 years old at the time, sustained, inter alia, a distal tibia fracture which resulted in one leg being 20mm shorter than

the other, repeated knee dislocation with concomitant pain, second degree burns on ten percent of her body from scraping on the cement platform, as well as permanent scarring and severe psychological injuries. Under the circumstances, the awards of $1.5 million for past pain and suffering and $1.5 million for future pain and suffering did not deviate materially from what would be reasonable compensation (CPLR 5501[c]; *see e.g. Lopez v Gomez*, 305 AD2d 292 [2003]; *Carl v Daniels*, 268 AD2d 395 [2000], *lv denied* 96 NY2d 704 [2001]).

The award of $110,783 for future medical expenses for four years was properly reduced by the trial court from $133,000 in light of the evidence before it, and we find no basis for a further reduction.

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

ENTERED: OCTOBER 20, 2009



CLERK

Tom, J.P., Buckley, Catterson, Freedman, Abdus-Salaam, JJ.

1217 The People of the State of New York, Ind. 4640/06
Respondent,

-against-

James Glover,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Lindsey M. Kneipper of counsel), for respondent.

Judgment, Supreme Court, New York County (Brenda Soloff and Rena K. Uviller, JJ. on motions; Renee A. White, J. at jury trial and sentence), rendered February 26, 2008, convicting defendant, of criminal possession of a controlled substance in the fourth degree, and sentencing him, as a second felony drug offender, to a term of 3 years, unanimously affirmed.

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. We do not find the police testimony connecting defendant to the drugs in question to be implausible.

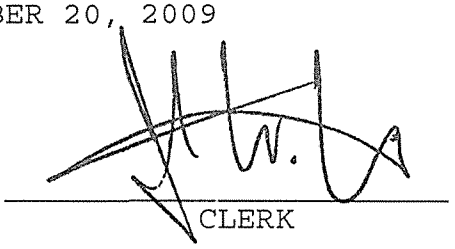
Each of defendant's suppression claims is procedurally defective. The court correctly denied as untimely defendant's attempt, made on the eve of trial and long after the legality of the search warrant had been litigated, to assert that the no-

knock entry into his apartment required suppression of the drugs because the warrant did not expressly authorize that manner of entry. From the inception of the case, defendant could have provided his attorney with sufficient information to raise this issue in a timely fashion (*see People v Graham*, 258 AD2d 387 [1999], *lv denied* 93 NY2d 899 [1999]). Defendant failed to preserve his contention that the information in the warrant application was stale, and we decline to review it in the interest of justice. As an alternative holding, we also reject each of these suppression claims on their merits.

To the extent that defendant is raising an ineffective assistance of counsel claim, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: OCTOBER 20, 2009



CLERK

Tom, J.P., Buckley, Catterson, Freedman, Abdus-Salaam, JJ.

1218 The People of the State of New York, Ind. 5890/06
Respondent,

-against-

Ramon Smart,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Richard Carruthers, J.), rendered on or about July 9, 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.

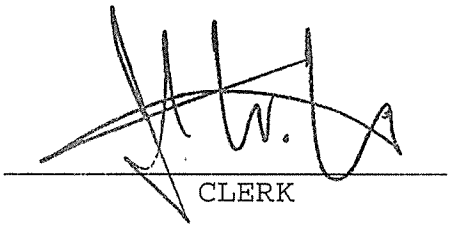
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department 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 20, 2009



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Tom, J.P., Buckley, Catterson, Freedman, Abdus-Salaam, JJ.

1219-
1219A Philip J. Smith, Index 311784/07
Plaintiff-Respondent,

-against-

Tricia Walsh-Smith,
Defendant-Appellant.

Sugarman Law Firm LLP, Syracuse (Rebecca A. Crance of counsel), and Joseph P. McCaffery & Associates, Aurora, IL (Joseph P. McCaffery of the Illinois bar, admitted pro hac vice, of counsel), for appellant.

Sheresky Aronson Mayefsky & Sloan, LLP, New York (David Aronson of counsel), for respondent.

Judgment, Supreme Court, New York County (Harold B. Beeler, J.), entered August 7, 2008, after a nonjury trial, dissolving the parties' marriage on the ground of cruel and inhuman treatment, declaring their prenuptial agreement valid and enforceable and incorporating its terms, and bringing up for review an order, same court and Justice, entered August 6, 2008, unanimously affirmed, without costs. Appeal from the aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

We reject defendant's contention that the prenuptial agreement is unconscionable. Given the clearly articulated waivers of rights upon divorce and the provision that defendant would receive a tax-free payment of $750,000 in the event of divorce more than 5 but less than 10 years after the marriage, we

cannot say that the agreement is so unfair "as to shock the conscience and confound the judgment of any [person] of common sense" (*Christian v Christian*, 42 NY2d 63, 71 [1977] [internal quotation marks and citation omitted]; *see Darrin v Darrin*, 40 AD3d 1391 [2007], *lv dismissed* 9 NY3d 914 [2007]).

Nor did defendant raise any triable issues of fact with respect to fraud, duress or overreaching in connection with the execution of the prenuptial agreement. That plaintiff failed to include his income in his financial disclosure is not by itself sufficient to vitiate the agreement (*Strong v Dubin*, 48 AD3d 232, 233 [2008]). The substantial financial disparity between the parties was fully disclosed at the time the agreement was executed, and there is no evidence that plaintiff used his wealth as leverage to coerce defendant to sign the agreement. The record does not support defendant's contention that she did not have sufficient time to review the agreement, which the parties signed three weeks before the wedding, or her contention that she did not understand the terms of the agreement, which was written in English, her native tongue. Moreover, defendant was represented by counsel, and, contrary to her contention, the fact that plaintiff paid for defendant's attorney does not by itself raise a triable issue of fact as to duress or overreaching.

The acknowledgment in the prenuptial agreement substantially complied with Real Property Law § 309-a (*see Weinstein v Weinstein*, 36 AD3d 797 [2007]).

Defendant failed to preserve her argument that a more stringent standard for cruel and inhuman treatment should be applied to acts that occur after the commencement of divorce proceedings (citing *Anderson v Anderson*, 58 AD2d 679 [3d Dept 1977]). However, were we to evaluate the evidence of defendant's post-commencement actions according to a higher level of proof, we would find that defendant's use of various media to discuss the parties' marital troubles and publicly humiliate plaintiff, coupled with the evidence that, as a result of defendant's conduct, plaintiff left the marital home and sought medical treatment, is sufficient to support the trial court's determination that defendant's post-commencement acts constituted cruel and inhuman treatment (*see e.g. Stoothoff v Stoothoff*, 226 AD2d 209 [1996]; *Xiaokang Xu v Xiaoling Shirley He*, 24 AD3d 862, 863-864 [2005], *lv denied* 6 NY3d 710 [2006]).

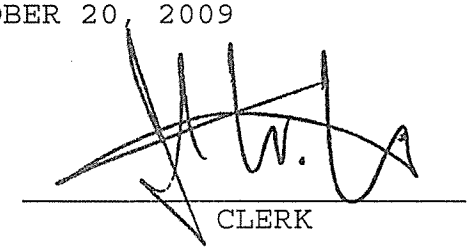
Defendant's application for additional time to amend her answer, including counterclaims and affirmative defenses, was unaccompanied by a proposed amended pleading or an affidavit of merits (*see Estate of Brown v Pullman Group*, 60 AD3d 481, 482 [2009], *lv dismissed in part, denied in part* __NY3d__, 2009 NY Slip Op 83547 [2009]). Moreover, it was made after two days of

trial on fault and the day before argument on plaintiff's motion for summary judgment.

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

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

ENTERED: OCTOBER 20, 2009



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Tom, J.P., Buckley, Catterson, Freedman, Abdus-Salaam, JJ.

1222 In re Elias Rodriguez, Index 51679/05
Petitioner-Appellant,

-against-

Robert T. Johnson, etc.,
Respondent-Respondent,

Elizabeth F. Bernhardt, etc., et al.,
Respondents.

Elias Rodriguez, appellant pro se.

Robert T. Johnson, District Attorney, Bronx (Andrew S. Holland of counsel), for respondent.

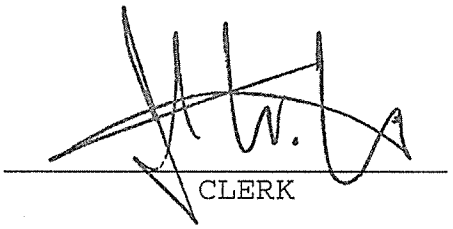
Judgment, Supreme Court, Bronx County (David Stadtmauer, J.), entered January 27, 2006, denying petitioner's Freedom of Information Law (FOIL) application to compel respondent District Attorney, inter alia, to disclose certain documents pertaining to petitioner's criminal prosecution, unanimously affirmed, without costs.

We affirm for reasons different from those stated by the article 78 court. We find that respondent met its obligations under FOIL (Public Officers Law § 84 *et seq.*). Respondent satisfied the requirements of section 89(3) by certifying that it had conducted a diligent search for the documents it could not locate (*see Matter of Bridgewater v Johnson*, 44 AD3d 549 [2007]). It properly deleted identifying characteristics of witnesses from certain documents on the ground that disclosure would constitute

an unwarranted invasion of personal privacy (*see* Public Officers Law § 87[2][b]). It properly withheld, pursuant to the public interest privilege, the statements of two witnesses who spoke with law enforcement personnel (*see Sanchez v City of New York*, 201 AD2d 325 [1994]). Respondent was not required to provide either reprints of photographs (*Matter of Adams v Hirsch*, 182 AD2d 583 [1992]) or duplicative documents (*see Matter of Cobb v Lombardi*, 261 AD2d 172 [1999]).

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

ENTERED: OCTOBER 20, 2009



CLERK

Tom, J.P., Buckley, Catterson, Freedman, Abdus-Salaam, JJ.

1223 In re Isabella Star G.,

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

Elizabeth G., et al.,
Respondents-Appellants,

Episcopal Social Services,
Petitioner-Respondent.

Robin S. Steinberg, The Bronx Defenders, Bronx (M. Chris Fabricant of counsel), for Elizabeth G., appellant.

Steven N. Feinman, White Plains, for Silvio G., appellant.

Magovern & Sclafani, New York (Joanna M. Roberson of counsel), for respondent.

Neal D. Futerfas, White Plains, Law Guardian.

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about July 2, 2007, which, following a fact-finding determination that respondent mother had permanently neglected the child and that respondent father's consent was not required for the child's adoption, terminated respondent mother's parental rights and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence (*Matter of Lionel Burton W., Jr.*, 30 AD3d 355 [2006]). The agency's efforts included scheduling regular

visitation between mother and child, and referring and encouraging the mother to attend and complete a drug treatment program. The record clearly and convincingly shows that despite those efforts, respondent failed to complete a drug treatment program and failed to attend all of her scheduled visits with the child.

Respondent mother's contention that the agency did not meet its burden because it did not make sufficiently diligent efforts to provide psychological or psychiatric services is without merit. Indeed, an agency's focus on a parent's major problem, here, drug addiction, is the most appropriate course of action (*Matter of Michael M.*, 172 AD2d 152 [1991]). In any event, the agency in fact made various referrals to both psychological and psychiatric services in which respondent mother failed to participate.

The court's findings regarding the best interests of the child were supported by a preponderance of the evidence, highlighting the positive environment provided by the foster mother and her desire to adopt the child, which was in furtherance of the goal of finding a permanent home for this child (*see Matter of Taaliyah Simone S.D.*, 28 AD3d 371 [2006]). Despite belated efforts to rehabilitate herself, a suspended judgment was not warranted since respondent mother had not completed a drug program and there was no evidence as to how she

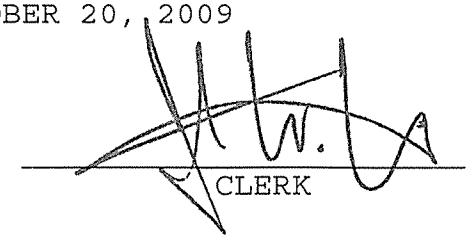
planned to provide this child with an adequate and stable home (*see Matter of Rutherford Roderick T.*, 4 AD3d 213 [2004]). Indeed, the child should not be denied permanence through adoption in order to provide respondent mother with more time to demonstrate that she can be a fit parent (*see Matter of Jada Serenity H.*, 60 AD3d 469 [2009]).

Respondent mother's argument that she was prejudiced due to the length of the proceedings was raised for the first time on appeal and is therefore unpreserved. Were we to review this issue, we would find that the length of the proceedings was not prejudicial.

Respondent father's consent to the adoption of this child was not required since he did not maintain "substantial and continuous or repeated contact with the child" (Domestic Relations Law § 111 [1][d]). The record shows that respondent father failed to provide financial support according to his means while the child was in foster care and that his visitation with the child was sporadic (*Matter of Norman Christian K.*, 60 AD3d 542 [2009]).

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

ENTERED: OCTOBER 20, 2009



Tom, J.P., Buckley, Catterson, Freedman, Abdus-Salaam, JJ.

1226 The People of the State of New York, Ind. 6180/05
Respondent,

-against-

Michael Johnson,
Defendant-Appellant.

Marino & Veneziano, New York (Amelio P. Marino of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Arlene Goldberg, J.), rendered November 13, 2006, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third and seventh degrees, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to an aggregate term of 8 years, unanimously affirmed.

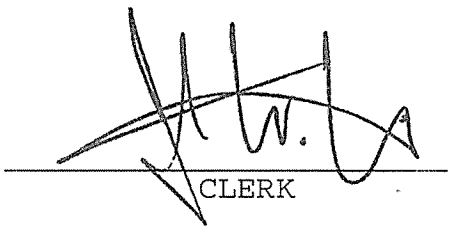
The court, which submitted seventh-degree possession as a lesser included offense of third-degree possession based on intent to sell, properly declined to submit seventh-degree possession under another count charging third-degree possession based on the weight of the drugs. There was no reasonable view of the evidence, viewed most favorably to defendant, to support such a charge. The scientific evidence established that the weight of the drugs in defendant's possession was well in excess

of the statutory threshold of one-half ounce (*see People v Lopez*, 297 AD2d 561, 562 [2002], *lv denied* 99 NY2d 560 [2002]; *People v Butler*, 248 AD2d 274 [1998], *lv denied* 91 NY2d 1005 [1998]). There was no basis, other than sheer speculation, for the jury to find that the chemist inaccurately weighed the drugs, or to otherwise reject the portion of his testimony concerning the weight of the substance, while at the same time accepting the portion of his testimony identifying the substance (*see People v Negron*, 91 NY2d 788, 792 [1998]).

We have considered defendant's remaining arguments and find them to be without merit.

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

ENTERED: OCTOBER 20, 2009



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Tom, J.P., Buckley, Catterson, Freedman, Abdus-Salaam, JJ.

1228 The People of the State of New York, Ind. 807/07
Respondent,

-against-

Gwenerva Cherry,
Defendant-Appellant.

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

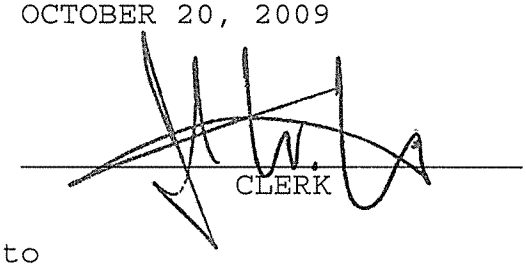
Robert M. Morgenthau, District Attorney, New York (Aaron Ginandes of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Renee A. White, J.), rendered on or about June 26, 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 20, 2009



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

Tom, J.P., Buckley, Catterson, Freedman, Abdus-Salaam, JJ.

1229 The People of the State of New York, Ind. 31755C/05
Respondent,

-against-

Njasang Nji,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Jason S. Whitehead of counsel), for respondent.

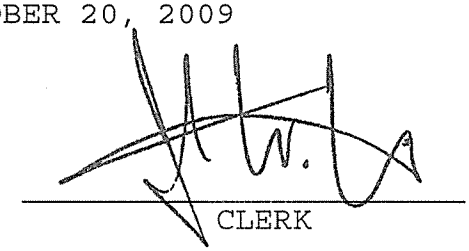
Judgment, Supreme Court, Bronx County (Robert G. Seewald, J.), rendered January 8, 2007, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him to a term of 10 years, unanimously affirmed.

Defendant's ineffective assistance of counsel claim is unreviewable on direct appeal because it involve matters outside the record involving counsel's strategic decisions (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). In particular, the present record is insufficient to support defendant's claim that his trial counsel simply followed his client's direction not to pursue a justification defense rather than exercising his own professional judgment. On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and

federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]), in that counsel made a reasonable strategic decision, after consulting with defendant, not to request a justification instruction. Counsel could have reasonably concluded that a justification defense would have been weak, at best, and that it would have undermined a stronger defense denying culpability and asserting the culpability of a specific third party (*see People v Vukel*, 263 AD2d 416 [1999], *lv denied* 94 NY2d 830 [1999]).

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

ENTERED: OCTOBER 20, 2009



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Tom, J.P., Buckley, Catterson, Freedman, Abdus-Salaam, JJ.

1231N In re Jefferies & Company, Inc., et al., Petitioners-Respondents, Index 103612/09

-against-

Infinity Equities I, LLC, Respondent-Appellant.

Siller Wilk LLP, New York (Stuart M. Riback of counsel), for appellant.

Gusrae, Kaplan, Bruno & Nusbaum PLLC, New York (Robert L. Herskovits of counsel), for respondents.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered April 30, 2009, which granted the petition of Jefferies & Company, Inc. and Jonathan D. Sopher to compel respondent Infinity Equities I, LLC to arbitrate certain claims, unanimously affirmed, with costs.

The petition was correctly granted. A non-signatory may be bound to an arbitration agreement if so dictated by the ordinary principles of contract and agency (*see McAllister Bros., Inc. v A & S Transp. Co., 621 F2d 519, 523-524 [2d Cir 1980]*). An agent acting within the scope of its authority may bind a principal to arbitration in connection with stock transactions (*see Scone Investments, LP v American Third Mkt. Corp.*, 992 F Supp 378 (SD NY 1998); *99 Commercial Street Inc. v Goldberg*, 811 F Supp 900 (SD NY 1993)).

Here, Infinity entered into an investment management

agreement which provided that the manager was authorized to choose broker/dealers through which purchases and sales of investments would be made and to negotiate "the terms on which purchases and sales will be effected." Prior to this agreement, the manager had entered into a clearing agreement with petitioners which included a clause mandating arbitration of disputes concerning stock transactions. The manager acted as an agent for Infinity whenever it chose to execute transactions through petitioners on Infinity's behalf. Since the agreement between Infinity and the manager authorized the latter to negotiate "the terms on which purchases and sales will be effected," the fact that the clearing agreement preceded the agency relationship between Infinity and the manager does not preclude Infinity's being bound by that agreement.

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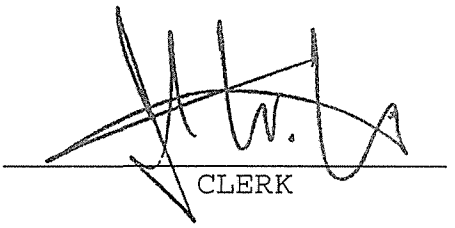
ENTERED: OCTOBER 20, 2009



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Sweeny, J.P., Buckley, DeGrasse, Freedman, Abdus-Salaam, JJ.

1330 In re Gregory Wyche, etc., Index 251956/08
Petitioner-Respondent,

-against-

New York State Division of Parole,
Respondent-Appellant.

Andrew M. Cuomo, Attorney General, New York (Steven C. Wu of counsel), for appellant.

Robert S. Dean, Center for Appellate Litigation, New York (David Klem of counsel), for respondent.

Order, Supreme Court, Bronx County (Nelson S. Roman, J.), entered May 27, 2009, which, in this CPLR article 78 proceeding, granted the application seeking to annul respondent's determination to revoke petitioner's parole and directed that petitioner's parole be reinstated, unanimously affirmed, without costs.

The record shows that at the final parole revocation hearing, petitioner was notified that respondent had procured a witness that would testify against him and that his counsel had failed to procure a witness and documents that he believed would be favorable to his defense. Petitioner expressed dissatisfaction with his representation and requested new counsel. Upon being informed that the hearing would be going forward, petitioner, who had a history of seizures, became ill and was subsequently taken to the hospital. Prior to being taken

to the hospital, petitioner requested an adjournment, but the request was denied as the Administrative Law Judge believed petitioner was feigning illness, and the hearing was held in the absence of both petitioner and his attorney. At the conclusion of the hearing, the charges against petitioner were sustained and his parole was revoked.

Under the circumstances presented, Supreme Court properly granted the petition on the basis that petitioner did not voluntarily, knowingly and intelligently waive his right to be present at the hearing. A parolee's right to be present and be heard at a parole revocation hearing is a fundamental due process right (*see Morrissey v Brewer*, 408 US 471, 488-489 [1972]), protected by statute (*see* Executive Law § 259-i[3]), and the proper remedy for holding the hearing in absentia is a restoration to parole status (*see People ex rel. Herrera v Schager*, 93 AD2d 847 [1983]; *Matter of Schwartz v Warden, New York State Correctional Facility at Ossining*, 82 AD2d 870 [1981]). Contrary to respondent's argument that the appropriate remedy for holding this parole revocation hearing in petitioner's absence is a new hearing, any new hearing would be held beyond the 90-day period proscribed for such a hearing by Executive Law § 259-i(3)(f)(i) (*see Matter of Schwartz*, 82 AD2d at 871), and

there is no evidence in the record of any prior delay attributable to petitioner (*cf. People ex rel. Martinez v New York State Bd. of Parole*, 56 NY2d 588, 590 [1982]).

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

ENTERED: OCTOBER 20, 2009