SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 22, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Sweeny, Renwick, Richter, JJ.

1232 The People of the State of New York, Respondent, Ind. 1751/03

-against-

Juan Tavarez,
Defendant-Appellant.

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

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein of counsel), for respondent.

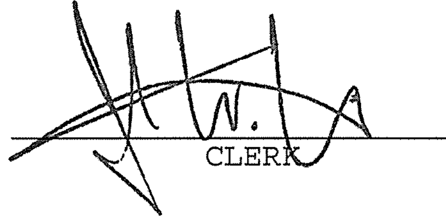
Judgment of resentence, Supreme Court, New York County (Carol Berkman, J.), rendered March 13, 2008, convicting defendant of violation of probation, and resentencing him to a term of 1 to 3 years, unanimously affirmed.

The determination was based on a preponderance of the evidence (*see* CPL 410.70[3]). There is no basis for disturbing the court's determinations concerning credibility. The evidence established that defendant violated the terms of his probation by

committing a misdemeanor, and the fact that the arrest for that crime resulted in an adjournment in contemplation of dismissal does not warrant a different result.

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

ENTERED: OCTOBER 22, 2009



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Gonzalez, P.J., Mazzarelli, Sweeny, Renwick, Richter, JJ.

1233 Abacus, a division of Doubleclick, Inc., Plaintiff-Respondent, Index 115873/04

-against-

Datagence, Inc., et al., Defendants-Appellants.

Smith, Gambrell & Russell, LLP, New York (J. Joseph Bainton and Carmine J. Castellano of counsel), for appellants.

Vincent E. Bauer, New York, for respondent.

Order and judgment (one paper), Supreme Court, New York County (Debra A. James, J.), entered June 12, 2008, which, following a nonjury trial, awarded plaintiff damages as against defendant Datagence, Inc. on its cause of action for breach of contract, directed a reference to determine the reasonable amount of plaintiff's attorneys' fees and dismissed Datagence's counterclaim for fraud, unanimously modified, on the law, to deny plaintiff's request for attorneys' fees, and otherwise affirmed, without costs.

The trial court erred in granting plaintiff's request for attorneys' fees. The agreement between the parties required Datagence to indemnify and hold plaintiff harmless for "third party claims, actions, losses, damages, liability, costs and expenses (including, without limitation, reasonable attorneys' fees and disbursements)"; it does not contemplate the award of

attorneys' fees in an action between the parties, but rather only in actions brought by third parties.

The trial court correctly dismissed Datagence's counterclaim for fraud in the inducement of the contract as there is no evidence that plaintiff entered the contract with the intention not to perform (*see Wagner Trading Co. v Walker Retail Mgt. Co.*, 307 AD2d 701, 705 [2003], citing *Graubard Mollen Dannett & Horowitz v Moskovitz*, 86 NY2d 112, 122 [1995]). In any event, both parties had the unfettered right to terminate the contract pursuant to a "termination of convenience" clause requiring only 90 days written notice. Datagence's subjective belief that the relationship with plaintiff would run for at least 5 years was not justifiable in light of the contract's limited term of 6 months, renewable for an additional 18 months (*see Meyercord v Curry,* 38 AD3d 315, 316 [2007]).

We have considered the remaining arguments and find them unavailing.

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

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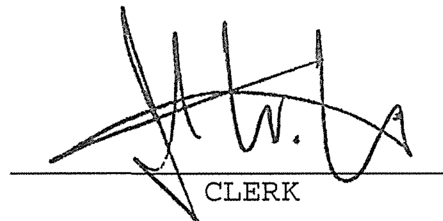

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Gonzalez, P.J., Mazzarelli, Sweeny, Renwick, Richter, JJ.

1234-
1235 Curtis Hawkins, Index No. 28189/03
Plaintiff-Respondent,

-against-

The City University of New York, et al.,
Defendants-Appellants.

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

Ballon Stoll Bader & Nadler, P.C., New York (Joseph C. Tristano of counsel), for respondent.

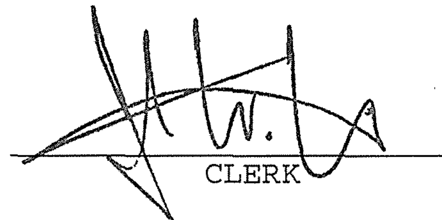
Order, Supreme Court, Bronx County (John A. Barone, J.), entered December 31, 2008, which, upon reargument, adhered to a prior determination denying defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. Appeal from order, same court and Justice, entered February 1, 2008, unanimously dismissed as superseded by the appeal from the order on reargument, without costs. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

In opposition to defendants' demonstration that plaintiff was terminated for the legitimate, nondiscriminatory reason that he threatened his supervisor with violence and engaged in other misconduct, plaintiff failed to raise the inferences that this reason was false and that discrimination based on his disability

was the real reason (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]). He submitted no evidence of a causal connection between his misconduct and his disability (*see Riddick v City of New York*, 4 AD3d 242, 246 [2004]).

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

ENTERED: OCTOBER 22, 2009



Gonzalez, P.J., Mazzarelli, Sweeny, Renwick, Richter, JJ.

1236 Jeanette Vera, Index 17627/04
Plaintiff-Respondent,

-against-

Dance Space Center, Inc.,
Defendant,

Warren Leshen, etc., et al.,
Defendants-Appellants.

Law Offices of James J. Toomey, New York (Eric P. Tosca of counsel), for appellants.

Pena & Kahn, PLLC, Bronx (Justin B. Katz of counsel), for respondent.

Order, Supreme Court, Bronx County (Dominic R. Massaro, J.), entered October 9, 2008, which, in an action for personal injuries, denied the motion of defendants-appellants Warren Leshen, Trustee Under Warren Leshen Revocable Trust of 1994, Dukane Fabrics International, Inc. and Crale Realty, LLC for summary judgment, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint and all cross claims as against defendants-appellants.

Plaintiff alleged that she was injured when, while participating in a dance class run by defendant Dance Space Center, Inc. (DSC), she tripped and fell over rubber mats covering an area of uneven flooring. The rubber mats had been placed on the floor by DSC, and plaintiff maintained that both

the mats and the uneven floor contributed to her fall.

Appellants established their prima facie entitlement to judgment as a matter of law by submitting evidence demonstrating that as out-of-possession owners with no contractual obligation to repair, they were not liable for plaintiff's injury. Appellants also showed that they had no actual or constructive notice of the alleged uneven floor, as the controller for appellant Dukane Fabrics testified that he was unaware of any complaints regarding the floor and had never noticed any uneven portions on the floor. Plaintiff also testified that she did not notice the uneven floor before she fell (*see Nieves v Burnside Assoc., LLC*, 59 AD3d 290 [2009]).

In opposition, plaintiff failed to raise a triable issue of fact, as she did not allege or submit evidence showing that the alleged structural defect constituted a specific statutory safety violation (*see Pulliam v Deans Mgt. of N.Y., Inc.*, 61 AD3d 519 [2009]; *Vasquez v The Rector*, 40 AD3d 265 [2007]). Nor did she

submit evidence showing that appellants had notice of the alleged defective condition of the floor.

THIS CONSTITUTES THE DECISION AND ORDER
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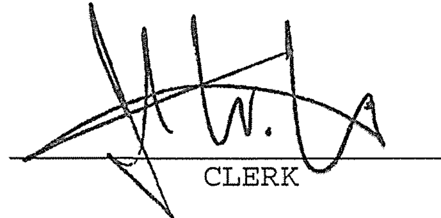

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Gonzalez, P.J., Mazzarelli, Sweeny, Renwick, Richter, JJ.

1237-
1238-
1239-
1240 In re Wilbur G. Hildreth,
Petitioner-Appellant,

-against-

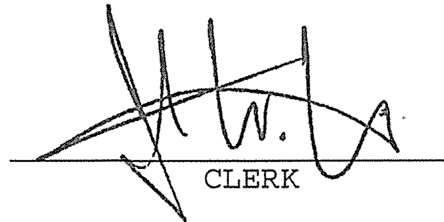
Dr. Karen Landau,
Respondent-Respondent.

An appeal having been taken to this Court by the above-named appellant from an order of the Family Court, New York County (Jane Pearl, J.), entered on or about November 10, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated October 13, 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 22, 2009



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Gonzalez, P.J., Mazzarelli, Sweeny, Renwick, Richter, JJ

1241 The People of the State of New York, Ind. 1436/07
Respondent,

-against-

Dawing Medina,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered March 27, 2008, convicting defendant, after a jury trial, of robbery in the first degree (two counts) and attempted robbery in the first degree, and sentencing him to an aggregate term of 9 years, unanimously affirmed.

The court properly denied defendant's suppression motion. The police stopped defendant, who matched a detailed description provided by three crime victims, in the vicinity of the scenes of the crimes three days after the last crime. In addition, the officer was carrying copies of surveillance photographs of the robber. Although defendant asserts that the photos were of poor quality, the hearing court examined them and expressly found that they had a "striking strong resemblance to this defendant." Accordingly, the police had, at the very least, reasonable

suspicion for the stop (*see e.g. People v Johnson*, 22 AD3d 371 [2005], *lv denied* 6 NY3d 754 [2005]). Since defendant was suspected of armed robberies, the officer was justified in conducting a protective frisk that yielded a box cutter (*see People v Mack*, 26 NY2d 311, 317 [1970], *cert denied* 400 US 960 [1970]).

The court properly exercised its discretion in permitting the prosecutor to argue that the similarities among the three crimes warranted an inference that they were committed by the same person, so that the evidence as to each crime tended to prove the other, and it properly instructed the jury on this subject. The pattern was sufficiently distinctive so as to be probative of defendant's identity (*see People v Beam*, 57 NY2d 241, 253 [1982]). The evidence established that defendant committed two robberies, and an attempted armed robbery, of three women within a period of a few days and a radius of a few blocks. The crimes had significant similarities, most notably being the fact that in each case the robber talked into a cell phone as he followed the victim into her building, apparently to give an impression of innocuous behavior. Defendant's challenge to the phrasing of the court's instruction 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 prosecutor did not shift the burden of proof by

commenting in summation on defendant's omission from his testimony of material facts that would have supported his defense (*see People v Overlee*, 236 AD2d 133, 143 [1997], *lv denied* 91 NY2d 976 [1998]).

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

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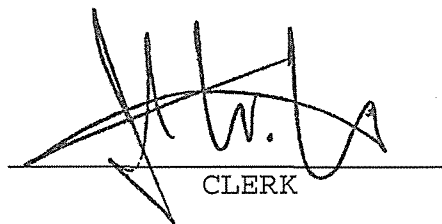

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Gonzalez, P.J., Mazzarelli, Sweeny, Renwick, Richter, JJ

1243 In re Bernard Cherry, Index 109938/07
Petitoner,

-against-

Martin Horn, Correction Commissioner
of the New York City Department
of Correction, et al.,
Respondents.

Stewart Karlin, New York, for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Suzanne K. Colt of counsel), for respondents.

Determination of respondent Commissioner, dated March 22, 2007, dismissing petitioner from his position as a correction officer, unanimously confirmed, the petition denied, and the proceeding, brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Lottie E. Wilkins, J.], entered January 23, 2008), dismissed, without costs.

The findings that petitioner failed to effectively perform his duties in 2004 and 2005 due to excessive absenteeism and the excessive use of sick leave, and engaged in insubordinate conduct unbecoming of an officer in 2004 and 2006 by refusing to comply with numerous orders from superior officers, are supported by substantial evidence (see *generally 300 Gramatan Ave Assoc. v State Div of Human Rights*, 45 NY2d 176, 180-181 [1978]; *see Matter of Tatum v Horn*, 37 AD3d 285 [2007]), and we find no basis

to disturb the findings of the Administrative Law Judge (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 444 [1987]).

We decline to consider petitioner's argument that respondent Department of Correction violated procedure by not providing a memorandum of complaint prior to issuing certain specifications and charges against him, as he failed to raise this issue in either his original or amended petition (*see Matter of Cocozzo v Ward*, 162 AD2d 202, 203 [1990]).

In light of the nature of petitioner's conduct, we find that the penalty imposed is not shocking to our sense of fairness (see *Matter of Van Osten v Horn*, 37 AD3d 317 [2007]).

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

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

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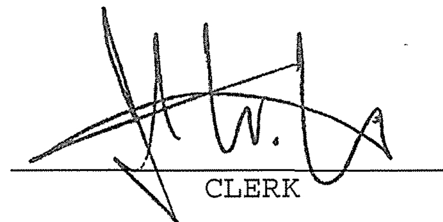

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Gonzalez, P.J., Mazzarelli, Sweeny, Renwick, Richter, JJ.

1244 The People of the State of New York, Respondent, SCI 4264/01 6443N/06

-against-

Jesse Brabham, Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Allen J. Vickey of counsel), for respondent.

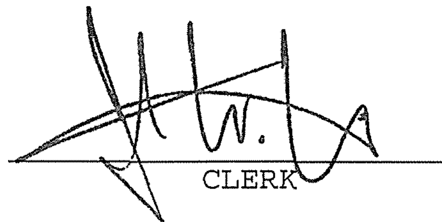
Judgments, Supreme Court, New York County (Laura A. Ward and Michael R. Ambrecht, JJ. at pleas; Michael R. Ambrecht, J. at sentence), rendered June 30, 2006, convicting defendant of attempted criminal possession of a controlled substance in the third degree and bail jumping in the second degree, and sentencing him, as a second felony offender, to consecutive terms of 4 to 8 years and 1½ to 3 years, respectively, unanimously modified, as a matter of discretion in the interest of justice, to the extent of directing that the sentences be served concurrently, and otherwise affirmed.

We find there are "mitigating circumstances" (Penal Law § 70.25[2-c]) warranting a concurrent sentence for bail jumping, and that the imposition of a consecutive sentence was excessive.

We have considered and rejected defendant's argument that his bail jumping conviction should be vacated.

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

ENTERED: OCTOBER 22, 2009



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Gonzalez, P.J., Mazzarelli, Sweeny, Renwick, Richter, JJ.

1246 Ficus Investments, Inc., et al., Index 600926/07
Plaintiffs-Respondents,

-against-

Private Capital Management, L.L.C., et al.,
Defendants,

Christopher Chalavoutis,
Defendant-Appellant.

Schlam Stone & Dolan LLP, New York (Erik S. Groothuis of counsel), for appellant.

Alston & Bird LLP, New York (Michael P. DeSimone of counsel), for respondents.

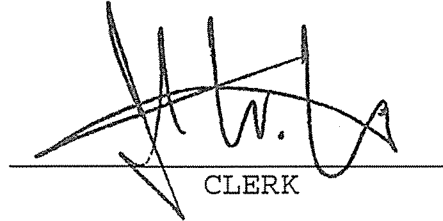
Order, Supreme Court, New York County (Bernard J. Fried, J.), entered September 10, 2008, which, to the extent appealed from as limited by the brief, granted plaintiffs' motion to hold defendant Christopher Chalavoutis in civil contempt, unanimously affirmed, with costs.

The record demonstrates that in February 2008 defendant was instrumental in negotiating the conveyance of certain mortgages without providing notice to plaintiffs, thereby disobeying an order of the court, entered December 21, 2007, that prohibited defendant from taking any action with respect to the subject mortgages "without first providing 48 hour[] written notice" to counsel for plaintiffs. The record further demonstrates that

defendant's actions were calculated to impair, impede or prejudice plaintiffs' rights (*see Matter of McCormick v Axelrod*, 59 NY2d 574, 583 [1983]).

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

ENTERED: OCTOBER 22, 2009



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Gonzalez, P.J., Mazzarelli, Sweeny, Renwick, Richter, JJ.

1247 The People of the State of New York, Respondent, Ind. 844/92

-against-

Junior Gumbs, Defendant-Appellant.

Michael E. Lipson, Jericho, for appellant.

Junior Gumbs, appellant pro se.

Robert M. Morgenthau, District Attorney, New York (Melissa Pennington of counsel), for respondent.

Order, Supreme Court, New York County (Lewis Bart Stone, J.), entered June 27, 2006, which denied defendant's motion for resentencing under the Drug Law Reform Act of 2004, unanimously affirmed.

The court properly recognized the degree of discretion it possessed (*compare People v Arana*, 32 AD3d 305 [2006]), and providently exercised its discretion when it determined that substantial justice dictated denial of defendant's application. The scale of defendant's involvement in drug trafficking outweighed his favorable prison record (*see e.g. People v Rizo*, 51 AD3d 436 [2008]; *People v Arana*, 45 AD3d 311 [2007], *lv dismissed* 9 NY3d 1031 [2008]).

We have considered and rejected defendant's remaining

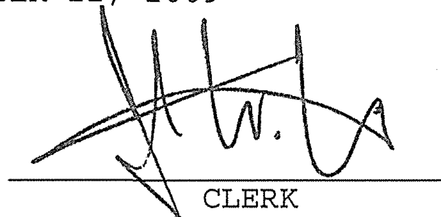
claims, including those contained in his pro se supplemental brief.

M-4208 - People v Junior Gumbs

Motion seeking leave to file supplemental reply brief denied.

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

ENTERED: OCTOBER 22, 2009



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Gonzalez, P.J., Mazzarelli, Sweeny, Renwick, Richter, JJ.

1248-
1249 The People of the State of New York, Ind. 4081/06
Respondent,

-against-

Michael Argentieri,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Mitchell J. Briskey of counsel), for appellant.

Michael Argentieri, appellant pro se.

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

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered July 19, 2007, convicting defendant, after a jury trial, of grand larceny in the third degree and criminal possession of stolen property in the third degree, and sentencing him, as a second felony offender, to concurrent terms of 3½ to 7 years, unanimously affirmed. Purported appeal from order, same court and Justice, entered on or about April 1, 2008, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously dismissed for failure to obtain leave to appeal.

The court properly denied defendant's CPL 190.50 motion to dismiss the indictment, in which he claimed he was deprived of his right to testify before the grand jury. The prosecutor's uncontroverted assertions in his affirmation in opposition establish that the failure of defendant to testify was caused by

counsel's refusal to provide the prosecution with a definitive answer as to whether defendant actually intended to testify, and failure to cooperate with the prosecution in scheduling an appearance (*see e.g. People v Parker*, 63 AD3d 537 [2009]).

The court properly exercised its discretion when it declined to recuse itself (*see People v Moreno*, 70 NY2d 403, 405-406 [1987]). The record does not support the conclusion that the court acted with any bias against defendant during the plea discussions or trial. We also reject defendant's related claim that the court should have permitted him to accept a disposition that was similar to one he had already rejected (*see People v Dicks*, 266 AD2d 106 [1999], *lv denied* 94 NY2d 947 [2000]), and there is no evidence that the court's refusal to do so was motivated by any bias or animosity toward defendant.

Taken as a whole, the court's charge conveyed the proper standards and properly instructed the jury that the People had the burden to prove beyond a reasonable doubt that defendant intended to permanently deprive the bank of its money at the time that he cashed a bad check (*see People v Fields*, 87 NY2d 821, 823 [1995]). The court's instruction to the effect that an unrealistic hope of eventual repayment does not necessarily negate larcenous intent was appropriate in the context of the evidence and the entire charge, and it did not shift the burden

of proof (*see People v Mishkin*, 134 AD2d 529 [1987], *lv denied* 71 NY2d 900 [1988]; *People v Shears*, 158 App Div 577, 580 [1913], *affd* 209 NY 610 [1913]). Defendant's related argument concerning preclusion of certain testimony is without merit because the testimony was irrelevant, and because defendant was ultimately permitted to place the same information before the jury in any event.

The court properly weighed the probative value against the prejudicial effect of permitting defendant's parole officer to testify that defendant was on parole, and that a condition of his parole was that he was not to open any bank account without his parole officer's permission. This was highly probative of defendant's larcenous intent, which was a critical issue at trial, since the evidence raised the inference that when defendant opened several checking accounts without notifying his parole officer, he intended to use these accounts as part of a check-kiting scheme (*see generally People v Alvino*, 71 NY2d 233, 241-242 [1987]). The prejudicial effect of this evidence was minimized by the court's thorough limiting instruction.

Defendant opened the door to the court's modification of its prior *Sandoval* ruling. That ruling had precluded the prosecutor from identifying certain convictions except to the extent of eliciting that they were theft-related. However, in response to his counsel's question as to whether several of his prior

convictions were theft-related, defendant answered affirmatively, but added that they were "all actually drug-related though." Since defendant gave a misleading impression of his prior record that tended to minimize the extent to which it evinced dishonesty (*see e.g. People v Jackson*, 45 AD3d 433, 433-434 [2007], *lv denied* 10 NY3d 812 [2008], *cert denied* __US__, 129 S Ct 462 [2008]), the court properly permitted the prosecutor to elicit the particular crimes of which defendant had been convicted.

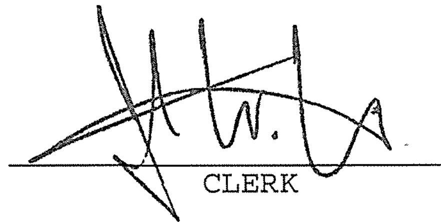
Defendant's pro se claims are without merit.

M-4147 - People v Michael Argentieri

Motion seeking production of minutes denied.

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

ENTERED: OCTOBER 22, 2009



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Gonzalez, P.J., Mazzarelli, Sweeny, Renwick, Richter, JJ.

1250 In Re New York Rezulin Products Liability Litigation — Index 752000/00, 104463/04

William Andrews, et al.,
Plaintiffs,

-against-

Pfizer, Inc., et al.,
Defendants.

- - - - -

Girardi/Keese,
Non-Party Appellant,

-against-

Duffy, Duffy & Burdo, Esqs.,
Non-Party Respondent.

Hinshaw & Culbertson LLP, New York (Schuyler B. Kraus of counsel), for appellant.

Robert & Robert, PLLC, Melville (Clifford S. Robert of counsel), for respondent.

Judgment, Supreme Court, New York County (Helen E. Freedman, J.), entered June 19, 2008, in favor of nonparty Duffy, Duffy & Burdo, Esqs. (Duffy) and against nonparty Girardi/Keese (Girardi) in the sum of $1,261,521.18, unanimously affirmed, without costs.

There is no basis to disturb the court's determination in favor of Duffy (*see Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]). At the hearing, Girardi called no witnesses on its own behalf to contradict the testimony of Duffy's witnesses as to the existence of an oral one-third fee arrangement between the two firms. The court properly declined to consider affidavits by a

witness who was not available for cross-examination in court (*see Seinfeld v Robinson*, 300 AD2d 208 [2002]).

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

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

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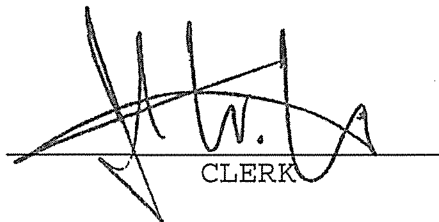

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Gonzalez, P.J., Mazzarelli, Sweeny, Renwick, Richter, JJ.

1252 The People of the State of New York, Ind. 4115/06
Respondent,

-against-

Billie Benjamin,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered on or about May 17, 2007, 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.

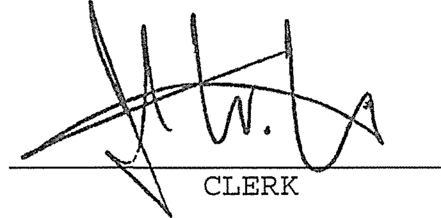
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department 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 22, 2009



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Gonzalez, P.J., Mazzarelli, Sweeny, Renwick, Richter, JJ.

1253 The People of the State of New York, Ind. 1482/06
Respondent,

-against-

Boris Quijano,
Defendant-Appellant.

LaSasso Griesmeyer Law Group, PLLC, New York (Mariel LaSasso of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Marc Krupnick of counsel), for respondent.

Judgment, Supreme Court, New York County (John Cataldo, J. at hearing; Ruth Pickholz, J. at jury trial and sentence), rendered October 30, 2007, convicting defendant of rape in the first degree and third degree and two counts of sexual abuse in the first degree, and sentencing him to an aggregate term of 10 years, unanimously affirmed.

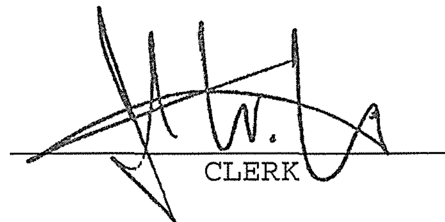
The court properly denied defendant's suppression motion. The police reasonably believed, based on an objective view of the circumstances, that defendant's wife (the sister of the rape victim) had authority to consent to the entry and search of the apartment where defendant lived (*see People v Gonzalez*, 88 NY2d 289, 295 [1996]; *People v Adams*, 53 NY2d 1, 9-11 [1981], *cert denied* 454 US 854 [1981]). Defendant's wife specifically told the police that she was presently living with defendant in the apartment as husband and wife, even though she had just left the

apartment after an argument with defendant. When the police accompanied her to the apartment, she sufficiently explained that her key did not work because defendant's habit was to change the lock after they had a fight, and that her belongings and those of her child remained in the apartment. These circumstances are completely different from those in which the consenting party was permanently estranged from the defendant and not just temporarily absent (*see e.g. People v Yalti*, 76 AD2d 847 [1980]). Here, the police had ample reason to believe that, despite defendant's apparent effort to exclude his wife, she was still a lawful occupant of the marital apartment who had not chosen to move out.

In any event, the record also establishes that, notwithstanding the presence of the police, the entry into the apartment and the recovery of evidence were accomplished entirely by private action (*see People v Duerr*, 251 AD2d 161 [1998], *lv denied* 92 NY2d 949 [1998]).

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

ENTERED: OCTOBER 22, 2009



CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Renwick, Richter, JJ.

1254 Peter Sass, Index 311895/07
Plaintiff-Respondent,

-against-

Sophia Sass,
Defendant-Appellant.

Law Office of Yonatan S. Levoritz, P.C., Brooklyn (Michael P. Biancanello of counsel), for appellant.

Winter & Grossman PLLC, Garden City (Jerome B. Winter of counsel), for respondent.

Judgment, Supreme Court, New York County (Harold Beeler, J.), entered July 25, 2008, dissolving the parties' marriage and incorporating the terms of a stipulation entered into March 19, 2008 settling, inter alia, custody issues, unanimously affirmed, without costs.

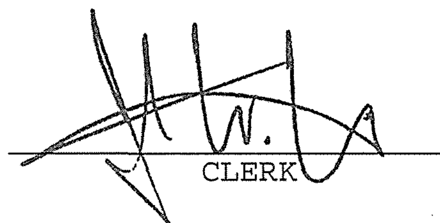
Defendant's argument that the judgment includes terms that are inconsistent with the stipulation of settlement and therefore does not accurately reflect the stipulation is not preserved for appellate review (*see* 22 NYCRR 202.48(c)(2); *Rowley v Amrhein*, 64 AD3d 469 [2009]).

Defendant failed to establish that she entered into the stipulation under duress (*see Mahon v Moorman*, 234 Ad2d 1 [1996]) or that she was not advised of the Child Support Standards Act (codified in Domestic Relations Law § 240[1-b] and Family Court Act § 413[1][h]). Nor does she appear to be objecting to any

specific component of the parties' child support arrangement (*see Blaikie v Mortner*, 274 AD2d 95, 99-100, 101 [2000]).

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

ENTERED: OCTOBER 22, 2009



Gonzalez, P.J., Mazzarelli, Sweeny, Renwick, Richter, JJ.

1255 The People of the State of New York, Ind. 3118/08
Respondent,

-against-

Emmanuel Starks,
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 (Timothy C. Stone 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 November 12, 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 22, 2009

CLERK

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

Gonzalez, P.J., Mazzarelli, Sweeny, Renwick, Richter, JJ.

1256N G&T Terminal Packaging Co. Inc., et al., Plaintiffs-Appellants, Index 26777/03

-against-

Western Growers Association, et al., Defendants-Respondents.

Linda Strumpf, South Salem, for appellants.

Trachtenberg Rodes & Friedberg LLP, New York (Leonard A. Rodes of counsel), for respondents.

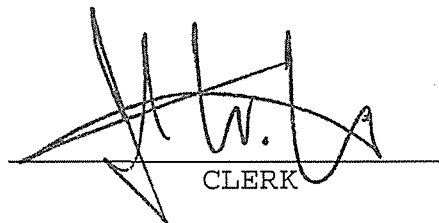
Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered on or about July 15, 2008, awarding defendants $32,306.50 in attorneys' fees and expenses in connection with their defense of this matter, unanimously affirmed, without costs.

The IAS court did not abuse its discretion by determining that plaintiffs' conduct was frivolous within the meaning of 22 NYCRR 130-1.1(c)(2) (*see Pickens v Castro*, 55 AD3d 443, 444 [2008]). Contrary to plaintiffs' claim, courts take into consideration the entire dispute between the parties, not just the lawsuit in which sanctions are imposed (*see Murray v National Broadcasting Co.*, 217 AD2d 651, 653 [1995]; *Matter of Jemzura v Mugglin*, 207 AD2d 645 [1994], *appeal dismissed* 84 NY2d 977 [1994]). If plaintiffs wished to litigate the underlying merits of the parties' dispute, e.g., the quality of the produce sold by

one of the defendants to one of the plaintiffs (*see* 56 AD3d 266 [2008], *appeal dismissed* 12 NY3d 729 [2009]), they should have pursued their federal appeals (*see generally Jason v Chusid*, 172 AD2d 172, 173 [1991], *lv dismissed* 78 NY2d 1008 [1991]).

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

ENTERED: OCTOBER 22, 2009



Gonzalez, P.J., Mazzarelli, Sweeny, Renwick, Richter, JJ.

1257N Darya A. Donnelly, etc., Index 114310/99
Plaintiff-Respondent, 590132/00
590387/00

-against-

The Treeline Companies, etc., et al.,
Defendants-Appellants.

\- - - - -

Commercial Building Maintenance Corp., et al.,
Third-Party Plaintiffs,

-against-

Republic Elevator Corp.,
Third-Party Defendant-Appellant.

\- - - - -

[And A Second Third-Party Action]

Barry, McTiernan & Moore, New York (Laurel A. Wedinger of counsel), for Treeline appellants.

London Fischer LLP, New York (Brian A. Kalman of counsel), for Commercial Building Maintenance Corp. and Frank Uniak, appellants.

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for Republic Elevator Corp., appellant.

Friedman & Moses, LLP, Garden City (Lisa M. Comeau of counsel), for respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered January 15, 2008, which granted plaintiff's motion to vacate a prior dismissal of this action and restore the case to the calendar, unanimously affirmed, without costs.

A motion to vacate a dismissal for failure to appear at a scheduled court conference (22 NYCRR 202.27) is governed by CPLR 5015. Such a motion must be made within one year of service of a

copy of the dismissal order with notice of entry, and be supported by a showing of reasonable excuse for the failure to attend the conference and a meritorious cause of action. Where the dismissal order has never been served with notice of entry, there is no time limit on making a motion to vacate the dismissal, and any alleged prejudice caused by post-dismissal delay, short of laches, is not a consideration (*Acevedo v Navarro*, 22 AD3d 391 [2005]).

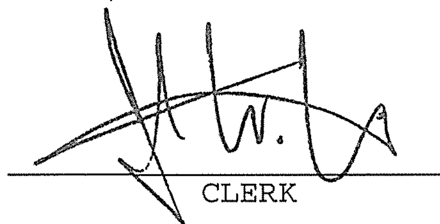
Plaintiff demonstrates both a reasonable excuse and the existence of a meritorious cause of action. The fact that none of the parties appeared for the scheduled court conference in July 2002 indicates that plaintiff's default was reasonable and likely attributable to the court's failure to notify everyone about the conference, whose date is not found in any prior conference order. Plaintiff's former attorney averred that his office was never notified of the conference or informed of the dismissal. Lack of receipt of notice can be a valid excuse for failure to appear at a conference (*see Latha Rest. Corp. v Tower Ins. Co.*, 285 AD2d 437 [2001]).

Plaintiff has also established a meritorious cause of action. Indeed, on a prior appeal in 2004 (13 AD3d 143), we affirmed the existence of numerous triable issues of fact concerning the liability of defendants Treeline and Commercial, and also of third-party defendant Republic.

Defendants contend that plaintiff's delay in moving to vacate the § 202.27 dismissal amounted to laches. While defendants were not apparently prejudiced in the two years immediately after the dismissal, during which they continued actively litigating, the case did thereafter remain inactive for a three-year period until plaintiff's motion to vacate the dismissal in 2007. This delay, though lengthy, was not unreasonable. In any event, defendants have not alleged prejudice from this delay, other than in conclusory fashion.

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

ENTERED: OCTOBER 22, 2009



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

1258 The People of the State of New York, Ind. 6337/06
Respondent,

-against-

Rich Singletary,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Karen M. Kalikow of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Grace Vee of counsel), for respondent.

Judgment, Supreme Court, New York County (Eduardo Padro, J.), rendered September 24, 2007, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 4 years, unanimously affirmed.

There is no record support for defendant's claim that the court singled out a holdout juror and gave her an allegedly coercive individual instruction. During deliberations, the jury revealed that it was deadlocked 11 to 1. Later in deliberations, the jury sent a note stating that a particular juror wanted to speak with the court individually and was refusing to continue deliberating in the interim. The court interviewed this juror in the presence of defendant and counsel, and she specifically stated that her problem "isn't with whose [*sic*] going which way"; instead, she complained that another juror was using a BlackBerry

that should have been taken from her prior to deliberations. After the BlackBerry was taken from the juror, the complaining juror stated that she still did not wish to continue deliberating. The court, however, directed her to do so, and she acquiesced in the directive. The record evidence is insufficient to support the conclusion that this juror was the holdout juror. Accordingly, defendant has failed to meet his burden of providing a factual record sufficient to permit appellate review of this claim (*see People v Kinchen*, 60 NY2d 772, 773-774 [1983]). In any event, regardless of whether the juror at issue was the lone holdout, the court's instruction to her was not coercive and it did not deprive defendant of a fair trial.

When a court officer reported to the court that, in his presence, the juror with the BlackBerry made a job-related call and discussed "absolutely nothing" about the case, there was no usurpation or improper delegation of a judicial function, or any violation of defendant's right to be present at all material stages of his trial, his right to counsel, and his right to a jury of 12 persons. The officer, who did not give any legal instructions to the juror or any other jurors, simply supplied information upon which the court made its own determination that no action, other than removing the BlackBerry, was warranted (*see People v Smith*, 304 AD2d 364 [2003], *lv denied* 100 NY2d 566 [2003] [no improper delegation where court relied on nonjudicial

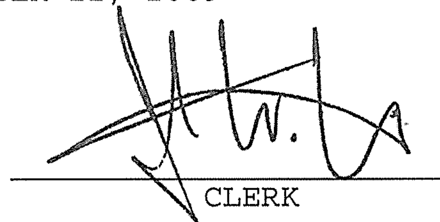
personnel to inquire as to absent juror's unavailability for CPL 270.35 purposes]; *People v Bruno*, 295 AD2d 228, 229 [2002], *lv denied* 99 NY2d 533 [2002][same]). Since the officer's role was entirely ministerial (*see People v Bonaparte*, 78 NY2d 26, 30-31 [1991]), defendant's claim is not exempt from preservation requirements, and we decline to review this unpreserved claim in the interest of justice. As an alternative holding, we also reject it on the merits.

The court properly admitted the undercover officer's testimony that at the time of the charged sale he recognized defendant from a previous encounter during which defendant had told him that he knew he was an officer and that he should leave the area. Even assuming that this conduct amounted to obstructing governmental administration "by means of intimidation" (Penal Law § 195.05) or otherwise constituted an uncharged crime or bad act, the evidence was relevant to the issue of the officer's ability to identify defendant as the seller, and its probative value outweighed its prejudicial effect, which was minimized by the court's limiting instructions. "Contrary to defendant's argument, a pattern of crimes employing a unique modus operandi is not the exclusive situation in which

uncharged crimes may be probative of identity" (*People v Laverpool*, 267 AD2d 93, 94 [1999], *lv denied* 94 NY2d 904 [2000]; *see also People v Carter*, 77 NY2d 95, 107 [1990], *cert denied* 499 US 967 [1991]; *People v Gines*, 36 NY2d 932 [1975]). Limiting the officer to testifying about an unexplained prior encounter would have deprived the jury of the full explanation for the officer's focus on defendant (*see e.g. People v Matthews*, 276 AD2d 385 [2000], *lv denied*, 96 NY2d 736 [2001]). In addition, we note that the prejudice to defendant was further reduced when his counsel made affirmative use of this evidence, arguing that his client would not have sold drugs to a person he had previously recognized as an officer.

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

ENTERED: OCTOBER 22, 2009



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

1259 Urban Justice Center, et al., Plaintiffs-Appellants, Index 105064/06

-against-

Sheldon Silver, Speaker of the New York State Assembly, et al., Defendants-Respondents.

Cleary Gottlieb Steen & Hamilton LLP, New York (Timothy M. Haggerty of counsel), for appellants.

Andrew M. Cuomo, Attorney General, New York (Peter Karanjia of counsel), for respondents.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered October 22, 2007, which granted defendants' motion to dismiss the complaint, unanimously modified, on the law, to declare that the instant controversy involving the Legislature's internal practices is not justiciable under the doctrine of separation of powers, and otherwise affirmed, without costs.

Plaintiffs challenge certain rules and practices adopted by the Assembly and Senate with respect to government-subsidized printing, franking and website-hosting privileges afforded to members of those chambers, rules and practices that allegedly violate the First Amendment guarantee of free speech.

Plaintiff Urban Justice Center (UJC) lacks standing to bring this action. While it alleges vaguely that the prohibitions on communication contained in the Assembly and Senate rules as to what constitutes "official mail" for purposes of Legislative Law

§ 16 interfere with its ability and that of its clients to receive the communications necessary to enable them to measure the responsiveness and efficacy of their elected representatives while determining the best use of their limited advocacy resources, this is not an infringement unique and distinct to UJC and its clients. All citizens have the right to open access to their elected representatives, and are deprived of that right when communications from their legislators are censored. UJC has failed to allege a personally concrete and demonstrable injury distinct from that suffered by the public at large (*see Matter of Transactive Corp. v New York State Dept. of Social Servs.*, 92 NY2d 579, 587 [1998]). For the same reason, UJC also lacks third-party standing to raise a First Amendment claim on behalf of its clients (*see Matter of MFY Legal Servs. v Dudley*, 67 NY2d 706, 708-709 [1986]). Because it has not alleged that the rules and practices at issue have caused it "injury by way of an added burden on [its] resources," or that its need to litigate this action on behalf of its clients is such a "central concern of our society" as to justify giving it standing without otherwise meeting the requirement of showing injury-in-fact, there is no basis for conferring organizational standing upon UJC under *Grant v Cuomo* (130 AD2d 154, 159 [1987], *affd* 73 NY2d 820 [1988]).

While this action is now moot with respect to the individual plaintiffs, the circumstances now presented on appeal nonetheless

satisfy the exception to the mootness doctrine in that the issues raised by the appeal are likely to recur. Given that the composition of the two legislative chambers has the potential to change every two years, it is highly possible that the claims of an individual member will evade review. Moreover, whether the Senate and Assembly rules as currently written and applied violate the free speech rights of members is a substantial question not yet addressed by this Court or the Court of Appeals (*see Matter of Chenier v Richard W.*, 82 NY2d 830 [1993]; *cf. Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713 [1980]).

Even though the action presents a live controversy as to the individual plaintiffs, we decline to address the merits of the appeal on separation of powers grounds (*see Urban Justice Ctr. v Pataki*, 38 AD3d 20 [2006], *appeal dismissed & lv denied* 8 NY3d 958 [2007]). "The doctrine of the separation of powers is grounded on the principle that each of the three branches of government, executive, legislative, and judicial, possesses 'distinct and independent powers, designed to operate as a check upon those of the other two co-ordinate branches,' and each 'is confined to its own functions and can neither encroach upon nor be made subordinate to those of another'" (*id.* at 27, quoting *Matter of Davies*, 168 NY 89, 101-102 [1901]). Each branch "should be free from interference, in the discharge of its own

functions and peculiar duties, by either of the others" (*Matter of Gottlieb v Duryea*, 38 AD2d 634, 635 [1971], *affd* 30 NY2d 807 [1972], *cert denied* 409 US 1008 [1972]. "It is not merely for convenience in the transaction of business that they are kept separate by the Constitution, but for the preservation of liberty itself" (*People ex rel. Burby v Howland*, 155 NY 270, 282 [1898]).

In short, "it is not the province of the courts to direct the legislature how to do its work" (*People ex rel. Hatch v Reardon*, 184 NY 431, 442 [1906], *affd* 204 US 152 [1907]), "particularly when the internal practices of the Legislature are involved" (*Urban Justice Ctr.*, 38 AD3d at 27). However, in seeking both a declaration that the subject rules and practices are invalid and an order restraining their future application by the majority parties of the two chambers, plaintiffs are asking for that very relief. Although the specific statutory mandate at issue (Legislative Law § 16) provides that "[t]he secretary of the senate . . . and the clerk of the assembly . . . *shall* prepay the postage on all official mail deposited in the post office of the respective houses for transmission throughout the mails by members of the senate and assembly, respectively" (emphasis added), it is left to the discretion of the respective chambers of the Legislature to define what constitutes "official mail," which each has done in the promulgation of the Senate and Assembly rules. As such, the matter is beyond judicial review

(*see Matter of Schulz v Silver*, 212 AD2d 293, 295 [1995], *lv denied* 87 NY2d 916 [1996]. Furthermore, while there is arguably a competing constitutional mandate at issue prohibiting the abridgement of the right to free speech, this right is not infringed upon by the Senate and Assembly rules, as plaintiffs, as well as any other member of the Legislature, are free to use the mails at their own expense, even if they are unable to convey their message through the use of public funds (*see e.g. Gottlieb*, 38 AD2d at 635).

Were we to consider the merits of the appeal, we would conclude that the Senate and Assembly rules pass constitutional muster. The government may make content-based restrictions on speech when the speech is subsidized (*Davenport v Washington Educ. Assn.*, 551 US 177, 188-189 [2007]), for the very reason that the government may eliminate the entire category of government-subsidized speech, i.e., it can choose to subsidize some speech and not other speech (*Regan v Taxation with Representation of Wash.*, 461 US 540, 548-550 [1983]). As long as the restrictions are viewpoint-neutral and not aimed primarily at suppression of ideas, such regulation of subsidized speech does not offend the First Amendment.

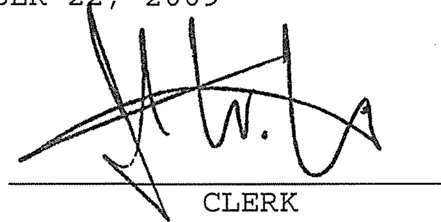
There is no concrete allegation in the complaint that the franking rules and practices are applied in a discriminatory manner, or that the effect that defendants seek to achieve

through such rules and practices is to drive certain ideas or viewpoints from the marketplace. To the contrary, the challenged rules do not prevent members of the Legislature from using self-financed mailings or operating their own websites to express opinions on any subjects they wish, as both individual plaintiffs do. Moreover, as the State franking privilege represents a nonpublic forum for speech (*cf. Perry Educ. Assn. v Perry Local Educators' Assn.*, 460 US 37, 45-46 [1983]), the restrictions on speech presented by the rules need only be reasonable in light of the purpose served by the forum, and not an effort to suppress expression merely because public officials oppose the speaker's view (*see Good News Club v Milford Cent. School*, 533 US 98, 106-107 [2001]; *Rosenberger v Rector & Visitors of Univ. of Va.*, 515 US 819, 829 [1995]; *International Socy. for Krishna Consciousness v Lee*, 505 US 672, 678-679 [1992]; *Cornelius v NAACP Legal Defense & Educ. Fund*, 473 US 788, 799-800 [1985]). The purpose of the franking privilege is to provide subsidized communication between legislators and their constituents with regard to the official business of the Legislature. Where the guidelines serve this purpose by prohibiting the use of certain content that might serve to disparage the Legislature as a whole or individual members, and most importantly, where the guidelines do not discriminate based on viewpoint but rather apply evenhandedly to all members of the Legislature regardless of party affiliation,

the rational basis test is easily met. We modify because in an action for a declaratory judgment, where the disposition is on the merits, the court should make a declaration even though the plaintiff is not entitled to the relief sought (*Hirsch v Lindner Realty Co.,* 63 NY2d 878, 881 [1984]).

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

ENTERED: OCTOBER 22, 2009



CLERK

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

1260 Luis A. Maldonado, Plaintiff-Respondent, Index 301555/08

-against-

Delores A. Altemburger, etc., Defendant-Appellant.

Shapiro, Beilly, Rosenberg & Aronowitz, LLP, New York (Roy J. Karlin of counsel), for appellants.

Dominick W. Lavelle, Mineola, for respondent.

Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered April 22, 2009, which denied defendant's motion to dismiss the complaint for lack of personal and subject matter jurisdiction, 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.

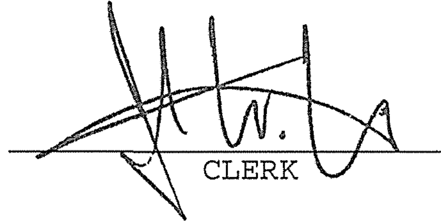
This is the second action brought by plaintiff to recover damages for injuries he allegedly sustained in a car accident. The first action was dismissed as a nullity, because the person who was named as the sole defendant had died before the action was commenced (*see Maldonado v Law Off. of Mary A. Bjork*, 64 AD3d 425 [2009]). This action must be dismissed because the named defendant is not the personal representative of the decedent's estate (*see id.*; *Marte v Graber*, 58 AD3d 1, 3 [2008]).

It does not avail plaintiff that defendant did not cooperate with him in his efforts to obtain the necessary documentation for

a SCPA 1002(1) petition for the appointment of an administrator. Plaintiff apparently failed to timely seek a court order to obtain the documentation.

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

ENTERED: OCTOBER 22, 2009



CLERK

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

1262 The People of the State of New York, Ind. 2411/05
Respondent,

-against-

Craig Frambro,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Jaime Bachrach 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 (Gregory Carro, J.), rendered on or about January 27, 2006,

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 22, 2009

CLERK

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

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

1263 The People of the State of New York, Respondent, Ind. 1640/06 4158/06

-against-

Elijah Cummings,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered March 19, 2007, convicting defendant, after a jury trial, of burglary in the second degree and two counts of criminal possession of a weapon in the third degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 20 years to life, unanimously affirmed.

Defendant, who was convicted of burglary in connection with his theft of loaded pistols and other property from a police station locker room, argues that the evidence is legally insufficient to support a second-degree burglary conviction because the police station was not a dwelling (*see* Penal Law § 140.00[3], § 140.25[2]). This contention is unpreserved and we decline to review it in the interest of justice. We note in this regard that defendant not only failed to challenge the sufficiency of the evidence on the dwelling issue but, after

asking for submission of criminal trespass as a lesser included offense, did not dispute statements by the court and prosecutor that the applicable trespass charge would be second-degree trespass (Penal Law § 140.15) because the police station was a dwelling.

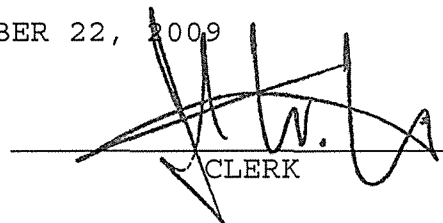
The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Walker*, 83 NY2d 455, 458-459 [1994]; *People v Pavao*, 59 NY2d 282, 292 [1983]). The convictions at issue were highly probative of defendant's credibility, and their probative value outweighed any prejudicial effect.

By failing to object, or by failing to request further relief after the court took curative action, defendant has failed to preserve his present challenges to the People's summation, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 22, 2009



CLERK

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

1269 The People of the State of New York, Respondent, Ind. 1951/06

-against-

Dondi Credle, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

Judgment, Supreme Court, New York County (Brenda Soloff, J. at dismissal motion; Eduardo Padro, J. at jury trial and sentence), rendered January 22, 2007, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal sale of a controlled substance in or near school grounds, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to concurrent terms of 8 years, unanimously affirmed.

After a first grand jury presentation resulted in insufficient votes for either an indictment or a dismissal, the People were not required to obtain the court's permission to re-present defendant's case to a second grand jury (*see* CPL 190.75 [3]), because there was neither a pre-vote withdrawal nor a dismissal (*see People v Morrison*, 34 AD3d 398, 399 [2006], *lv denied* 8 NY3d 948 [2007]). "[I]n order to dismiss a charge,

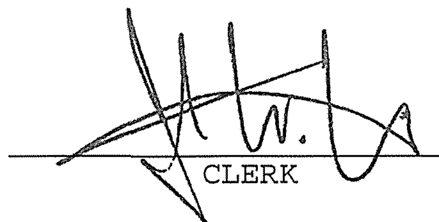
there must be a formal vote of the grand jury and 12 of its members must concur in that result" (*People v Aarons*, 2 NY3d 547, 549 [2004]). Defendant argues that the rule in *Aarons* relieving the prosecutor of the obligation to obtain leave from the court following a failure of the grand jury to agree should be limited to re-presentations to the same grand jury. While the opinion in *Aarons* noted that the re-presentation in that case was to the same grand jury, and it observed that forum shopping concerns were not present, we conclude that the essential holding of *Aarons* is that, as a matter of statutory interpretation, a failure of a grand jury to agree on either an indictment or a dismissal is not a dismissal, and thus does not require leave to re-present. *People v Wilkins* (68 NY2d 269 [1986]) does not apply here, because it involves prosecutorial withdrawal of a completed case from a grand jury without taking a vote, followed by re-presentation to a second grand jury. We see no reason to extend *Wilkins* to the situation where a vote (in the present case, two votes) is actually taken, but results in no grand jury action. Re-presenting a case to a second grand jury after what could be described as a "hung grand jury" does not involve forum shopping.

The court properly declined to order the People to produce arrest reports regarding people arrested on unrelated charges at the same time and place as defendant. The record supports the court's conclusion that these documents were not discoverable

under *Brady v Maryland* (373 US 83 [1963]), *People v Rosario* (9 NY2d 286 [1961], *cert denied* 368 US 866 [1961]), or CPL article 240. Whether these reports were the proper subjects of a subpoena duces tecum is a different issue, which defendant has not preserved. Defendant did not expressly ask for a subpoena, did not prepare such a document, and did not comply with the requirements of CPLR 2307 for obtaining government records (*see* CPL 610.20[3]). Merely alluding to a possible remedy is insufficient to preserve a claim that the court should have granted such a remedy (*see People v Borrello*, 52 NY2d 952 [1981]), and we decline to review this unpreserved claim in the interest of justice. As an alternative holding, we also reject it on the merits. Defendant did not establish a "factual predicate which would make it reasonably likely that documentary information will bear relevant and exculpatory evidence" (*Matter of Constantine v Leto*, 157 AD2d 376, 378 [1990], *affd* 77 NY2d 975 [1991] [internal quotation marks omitted]).

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

ENTERED: OCTOBER 22, 2009



CLERK

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

1270 Ziograin Correa, Index 20877/01
Plaintiff-Respondent, 83494/02
86096/07
-against- 83709/08

City of New York, et al.,
Defendants,

New York Yankees,
Defendant-Appellant,

ESPN Regional Television Inc.,
Defendant-Respondent.

[And Other Actions]

Havkins Rosenfeld Ritzert & Varriale, LLP, New York (Carla Varriale of counsel), for appellant.

Gorayeb & Associates, P.C., New York (John M. Shaw of counsel), for Ziograin Correa, respondent.

The Law Offices of Christopher P. DiGiulio, P.C., New York (William Thymius of counsel), for ESPN Regional Television Inc., respondent.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about July 7, 2008, which, to the extent appealed from, denied the motion of defendant New York Yankees for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

During the 2000 baseball season, plaintiff was employed as a security guard at Yankee Stadium, assigned to sit on a stool in the field level of the stands, directly behind home plate. Although that section was protected from batted or thrown balls

by backstop screening, plaintiff's right hand was struck and fractured by a foul ball. Plaintiff alleges that the ball was able to get through to him because a window in the netting had been opened to allow placement of a television camera operated by defendant ESPN, and an electrician employed by third-party defendant PEM Electrical Corp. negligently failed to tightly clip the netting around the camera.

The proprietor of a ball park is not required to protect all spectators, but "need only provide screening for the area of the field behind home plate where the danger of being struck by a ball is the greatest" (*Akin v Glens Falls City School Dist.*, 53 NY2d 325, 331 [1981]). Such screening must be "of sufficient extent to provide adequate protection for as many spectators as may reasonably be expected to desire such seating in the course of an ordinary game" (*id.*; *see Davidoff v Metropolitan Baseball Club*, 61 NY2d 996 [1984]). Since "even after the exercise of reasonable care, some risk of being struck by a ball will continue to exist," a factual question for the jury would be presented "where the adequacy of the screening in terms of protecting the area behind home plate properly is put in issue" (*Akin*, 53 NY2d at 331). In this case, although the Yankees demonstrated that screening was in place in the required area, it did not establish as a matter of law that such screening provided adequate protection to spectators and employees situated in the

danger zone behind home plate during nationally televised games.

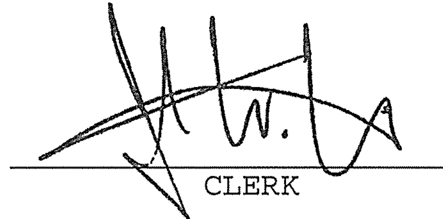
Nor did the Yankees establish that they did not retain the PEM electrician who assisted the ESPN cameraman during the game, and the record contains conflicting evidence on that issue. Although owners generally are not vicariously liable for negligence on the part of an independent contractor (*see Kleeman v Rheingold*, 81 NY2d 270, 273 [1993]), the Yankees, as the proprietor of a place of public assembly, have "a nondelegable duty to provide the public with a reasonably safe premises," and "the duty to provide [their] employees and the employees of independent contractors with a safe place to work" (*Backiel v Citibank*, 299 AD2d 504, 505, 507 [2002]).

The assumption-of-risk doctrine also presents issues of fact for a jury (*see Maddox v City of New York*, 66 NY2d 270, 278 [1985]). Although the risk of being hit by an errant ball is inherent in the sport of baseball, spectators and employees at a ball park cannot be deemed to have assumed the risk that the proprietor will fail to comply with the applicable standard of care adopted in *Akins*, thereby exposing them to an enhanced risk of injury beyond that inherent in the nature of the sport (*see Siegel v City of New York*, 90 NY2d 471, 484 [1997]). Furthermore, plaintiff, a young security guard, testified that he was directed to sit on the stool provided by the Yankees directly

behind home plate throughout the game (*cf. Maddox*, 66 NY2d at 279).

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

ENTERED: OCTOBER 22, 2009



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

1272 The People of the State of New York, Respondent,

Ind. 1425/02

-against-

William Hassell, 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 (Rena K. Uviller, J.), rendered December 3, 2008, resentencing defendant to a term of 3½ years with 5 years' postrelease supervision, unanimously affirmed.

The court properly resentenced defendant to comply with the requirement that a term of postrelease supervision be part of the court's oral pronouncement of sentence. Defendant's challenges to his resentencing are essentially identical to those rejected by this Court in *People v Hernandez* (59 AD3d 180 [2009], *lv granted* 12 NY3d 817 [2009]).

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

ENTERED: OCTOBER 22, 2009

CLERK

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

1273 The People of the State of New York, Respondent, Ind. 3966N/07

-against-

Jason Smith,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Judgment, Supreme Court, New York County (Laura Ward, J.), rendered on or about June 19, 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.

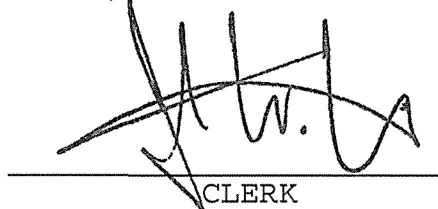
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department 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 22, 2009



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

1274 Richard Rosenbaum, Index 101693/07
Plaintiff-Respondent-Appellant,

-against-

Atlas & Design Contractors, Inc.,
Defendant-Appellant-Respondent.

Raymond E. Kerno, Mineola, for appellant-respondent.

Stroock & Stroock & Lavan LLP, New York (Kevin L. Smith of counsel), for respondent-appellant.

Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered July 17, 2008, after a nonjury trial, awarding plaintiff the principal sum of $46,467.75 for wilful exaggeration of a lien and dismissing defendant's counterclaims, unanimously affirmed, without costs.

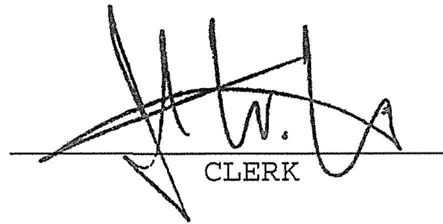
The credibility-based determination that defendant had wilfully exaggerated the value of its services, rather than merely made an honest mistake (*see Goodman v Del-Sa-Co Foods,* 15 NY2d 191, 194-195 [1965]), was based on a fair interpretation of the evidence (*see Thoreson v Penthouse Intl.,* 80 NY2d 490, 495 [1992]). Contrary to defendant's contention, denial of its counterclaim for breach of contract was not based on improper linkage with the determination that the lien was forfeited; rather, the ruling was premised on the credibility-based rejection of defendant's argument that its fees were largely for design services and the recognition that when its contract was

terminated it had not yet commenced any of the physical construction it had undertaken. Having terminated the construction contract pursuant to its at-will termination provision, plaintiff was not entitled to damages for breach; in any event, the "proposed" time frame set forth was precatory and thus did not give rise to termination for cause or support an action for breach.

We have considered the parties' other contentions for affirmative relief and find them unavailing.

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

ENTERED: OCTOBER 22, 2009



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

1275 The People of the State of New York, Ind. 5260/02
Respondent,

-against-

George Jordan,
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 (Rena K. Uviller, J.), rendered September 25, 2008, resentencing defendant to a term of 7 years with 5 years' postrelease supervision, unanimously affirmed.

The court properly resentenced defendant to comply with the requirement that a term of postrelease supervision be part of the court's oral pronouncement of sentence. Defendant's challenges to his resentencing are essentially identical to those arguments rejected by this Court in *People v Hernandez* (59 AD3d 180 [2009], *lv granted* 12 NY3d 817 [2009]).

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

ENTERED: OCTOBER 22, 2009

CLERK

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

1276 Lisa O'Brien, Index 23545/03
Plaintiff-Respondent, 83947/08

-against-

Hilton Hotels Corporation,
Defendant-Appellant,

The East Side House, etc.,
Defendant.

[And A Third-Party Action]

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

Friedman & Simon, LLP, Jericho (Lauren Cristofano of counsel), for respondent.

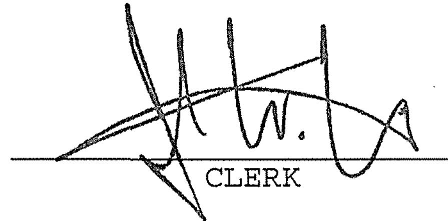
Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered March 10, 2009, which, to the extent appealed from as limited by the brief, denied defendant Hilton Hotels Corporation's motion for summary judgment dismissing the negligence cause of action as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant-appellant dismissing the complaint as against it.

There is no evidence in the record that defendant had actual notice of any defective condition in the desk that fell on and injured plaintiff, and defendant denied that it had received any complaints about the desk before plaintiff's injury occurred,

thereby establishing that it also lacked constructive notice (*see Galbreith v Torres*, 9 AD3d 304 [2004]; *Peffers v Hilton Hotels Corp.*, 279 AD2d 386 [2001]). Plaintiff presented no evidence that would raise an issue of fact.

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

ENTERED: OCTOBER 22, 2009



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