SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**APRIL 22, 2010**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, McGuire, DeGrasse, Manzanet-Daniels, JJ.

1708 Kevin Kaiser, Index 112674/07
Plaintiff-Respondent,

-against-

Raoul's Restaurant Corporation, et al.,
Defendants-Appellants,

Cindy Smith,
Defendant.

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Rotondi & Associates P.C., New York (Susan R. Nudelman of counsel), for appellants.

DeLince Law PLLC, New York (J. Patrick DeLince of counsel), for respondent.

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Order, Supreme Court, New York County (Louis B. York, J.), entered May 30, 2008, which, insofar as appealed from, denied defendants-appellants' motion pursuant to CPLR 3211(a)(7) to dismiss plaintiff's cause of action for age discrimination against the two individual defendants, who are owners and officers of the corporate defendant, plaintiff's former employer, unanimously affirmed, without costs.

*Patrowich v Chemical Bank* (63 NY2d 541 [1984]) has been broadly read to adopt the "economic reality" test for determining

who may be sued as an "employer" under the Human Rights Law (Executive Law art 15), although the cases do not invariably use the phrase "economic reality" (*see e.g. Barbato v Bowden*, 63 AD3d 1580 [4th Dept 2009]; *Pepler v Coyne*, 33 AD3d 434 [1st Dept 2006]; *Strauss v New York State Dept. of Educ.*, 26 AD3d 67 [3d Dept 2005]; *Brotherson v Modern Yachts*, 272 AD2d 493 [2d Dept 2000]; *Hafez v Avis Rent A Car Sys.*, 2000 US App LEXIS 31032, *9-10, 2000 WL 1775508, *3 [2d Cir 2000]; *Mugavero v Arms Acres, Inc.*, 2009 US Dist LEXIS 30431, *68-69, 2009 WL 890063, *21 [SD NY 2009]). This test requires the plaintiff to put forth evidence that shows the corporate employee sued (i.e., the putative employer) has "an[] ownership interest [in the company] or power to do more than carry out personnel decisions made by others" (*id.* at 543-544); however, *Patrowich's* holding is in fact narrower. In affirming the Appellate Division's order dismissing the plaintiff's Human Rights Law claims, the Court of Appeals necessarily decided only that the definition of "employer" under the Human Rights Law (Executive Law § 292[5]) is not, in any event, broader than the definition of that term under the relevant federal statutes.

The broad reading of *Patrowich* is not easily reconciled with the second paragraph of the opinion. The Court observed that the

definition of employer under the Human Rights Law (Executive Law § 292[5]) "relates only to the number of persons employed and provides no clue to whether individual employees of a corporate employer may be sued under its provisions" (63 NY2d at 543). The Court then stated as follows: "The contrary is, however, suggested by subdivision 3-b of section 296, which makes it a discriminatory practice for 'any real estate broker, real estate salesmen *or employee or agent thereof*' to make certain representations, for it indicates that the Legislature differentiated that provision from the general definition of 'employer'" (*id.*). If the broad reading of *Patrowich* is correct, the Court took pains to note the textual support for concluding that an individual employee cannot be sued as an employer and then dismissed that support without explanation.

Although *Patrowich* holds that a necessary condition for an employee to be classified as an employer for purposes of the Human Rights Law is that the employee have an ownership interest in the company or the power to do more than carry out personnel decisions made by others, the Court did not hold that either condition was a sufficient condition. In the more than 25 years since *Patrowich*, the Court of Appeals has not again had occasion to construe the definition of "employer" under the Human Rights Law. Until the Court does, we think it appropriate to follow our

precedents that adopt the broad reading of the holding of *Patrowich* (*see e.g. Pepler v Coyne, supra; Dorvil v Hilton Hotels Corp.*, 25 AD3d 442 [1st Dept 2006]); *Gallegos v Elite Model Mgt. Corp.*, 28 AD3d 50, 60 [1st Dept 2005]).

We reject plaintiff's contention that appellants' argument that the two individuals in question are not employers is frivolous. As the Court of Appeals has not addressed the argument, at least not expressly, it cannot be regarded as frivolous.

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

ENTERED: APRIL 22, 2010

CLERK

Gonzalez, P.J., Saxe, Nardelli, McGuire, Moskowitz, JJ.

2600 The People of the State of New York, Ind. 6999/06
Respondent,

-against-

Michael Ferguson,
Defendant-Appellant.

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Office of the Appellate Defender, New York (Richard M. Greenberg of counsel), and Weil, Gotshal & Manges, LLP, New York (Kathy A. Le of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

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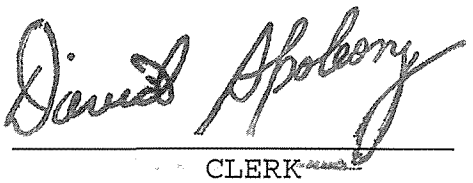
Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered November 14, 2007, convicting defendant, after a jury trial, of grand larceny in the fourth degree and criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to concurrent terms of 2 to 4 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. The jury reasonably could have concluded from a store employee's testimony that defendant intentionally assisted

the codefendant in stealing merchandise, and discredited the testimony of a defense witness that defendant did no more than unwittingly accompany the witness on a shoplifting expedition.

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

ENTERED: APRIL 22, 2010



CLERK

Gonzalez, P.J., Saxe, Nardelli, McGuire, Moskowitz, JJ.

2601 In re Keenan R.,
Petitioner-Appellant,

-against-

Julie L., et al.,
Respondents-Respondents.

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Elisa Barnes, New York, for appellant.

Law Office of John Z. Marangos, Staten Island (Denise Marangos of counsel), for respondents.

Michelle F.P. Roberts, New York, Law Guardian.

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Order, Family Court, New York County (Sara Schecter J.), entered on or about March 20, 2008, which, after a hearing pursuant to a remand by this Court (38 AD3d 435 [2007]), denied the petition for visitation with petitioner's younger siblings, unanimously affirmed, without costs.

Domestic Relations Law § 71 provides that a decision as to the visitation between siblings is to be made under the "best interests of the child" standard (*see Matter of Christopher B. v Administration for Children's Servs.*, 39 AD3d 378 [2007], *lv denied* 9 NY3d 805 [2007]). Moreover, "[t]he courts should not lightly intrude on the family relationship against a fit parent's wishes. The presumption that a fit parent's decisions are in the

child's best interests is a strong one" (*see Matter of E.S. v P.D.*, 8 NY3d 150, 157 [2007]).

Here, there was no allegation in the record that respondents, the adoptive parents of petitioner's younger twin sisters, were not fit parents to the twins, nor was there any evidence to that effect, and they strongly objected to visits between petitioner and his sisters. Furthermore, the evidence in the record did show that petitioner's behavior was sufficiently troubling to warrant respondents' desire to keep him from visiting with his sisters. Respondents' expert also testified that the prospect of visits among the siblings caused the twins great anxiety, enough so that it raised the possibility of post-traumatic stress for them. Thus, the expert concluded, visits with petitioner would not be in his sisters' best interests.

Additionally, the record showed that there were no real familial bonds between petitioner and his sisters, and that respondents constituted the only real family the sisters had ever known. Thus, we conclude that forced visitation would serve

little purpose, except to exacerbate the sisters' anxiety (*see Matter of Justin H.*, 215 AD2d 180, 181 [1995], *lv denied* 86 NY2d 709 [1995]).

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

ENTERED: APRIL 22, 2010

CLERK

Gonzalez, P.J., Saxe, Nardelli, McGuire, Moskowitz, JJ.

2604 In re Juan A. and Another,

Dependent Children Under the
Age of Eighteen Years, etc.,

Family Support Systems Unlimited, Inc.,
Petitioner-Respondent,

Nhaima D.R.,
Respondent-Appellant,

Juan A.,
Respondent.

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Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

John R. Eyerman, New York, for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Patricia Colella of counsel), Law Guardian.

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Order, Family Court, Bronx County (Carol Ann Stokinger, J.), entered on or about June 13, 2008, which found that respondent mother had permanently neglected the subject children, terminated her parental rights, and committed custody and guardianship of the children jointly to petitioner and the New York City Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The threshold inquiry in any permanent neglect proceeding is whether the agency discharged its statutory obligation to exert diligent efforts to encourage and strengthen the parent-child

relationship (*see Matter of Sheila G.*, 61 NY2d 368, 373 [1984]). Here, petitioner demonstrated that it prepared a service plan for respondent that included drug treatment, parenting skills and anger management programs, and that she failed to comply with the plan during the relevant time period. When respondent advised petitioner that she had not completed the drug treatment program because her public assistance was terminated, the caseworker referred her to the section of the agency with the expertise to assist her in reapplying. The agency addressed respondent's youth by referring her to a parenting skills program for teenage parents, which she failed to attend. It also established, by clear and convincing evidence, that respondent permanently neglected her children by maintaining only sporadic contact with them throughout her unsettled history as a parent, and failed to address her drug problem during the relevant period *(see Matter of Sean LaMonte Vonta M.*, 54 AD3d 635 [2008]).

The court properly found a preponderance of the evidence in support of the conclusion that it was in the best interests of the children to terminate respondent's parental rights and free them for adoption by their foster mother, with whom they had been living for years. The evidence revealed that the children have a loving and supportive relationship with the foster mother and her husband, were receiving excellent care, and were thriving in that

environment. Respondent acknowledged that she was not yet able to provide the children with a stable home.

A suspended judgment, which is a brief grace period designed to prepare the parent to be reunited with the child *(see Matter of Michael B.*, 80 NY2d 299, 311 [1992]), is not warranted here because it does not appear to be in the best interests of the children to wait any longer for respondent to gain the ability to fulfill her parental obligations.

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

ENTERED: APRIL 22, 2010

CLERK

Gonzalez, P.J., Saxe, Nardelli, McGuire, Moskowitz, JJ.

2605 Louis Serrante, Index 113750/07
Plaintiff-Appellant,

-against-

GJF Construction Corporation,
Defendant-Respondent.

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Balestriere Lanza PLLC, New York (John Balestriere of counsel), for appellant.

Moses & Singer LLP, New York (Henry J. Bergman of counsel), for respondent.

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Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered February 25, 2009, after a nonjury trial, dismissing the complaint in its entirety and awarding defendant the total sum of $510,121.10 on its counterclaim for repayment of certain outstanding loans, unanimously affirmed, with costs.

There is no basis for concluding that the trial court's findings could not have been reached under any fair interpretation of the evidence (*see Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]). Based upon the credible testimony of defendant's chief financial officer and the documentary evidence, the court properly held that the monies listed in the corporate Loan & Exchange ledgers and the balance due for the stock purchase under the Shareholders' Agreement constituted a valid

loan obligation (*see People v Grasso*, 13 Misc 3d 1227A, 2006 NY Slip Op 52019 U, *22 [Sup Ct NY County 2006]).

Plaintiff provided no evidence to counter paragraph 6(b) of the Shareholders' Agreement which specifically provided that the book value of the surrendered shares would be determined by an accounting firm retained by the company. Nor did he provide any expert testimony to challenge the methodology or valuation of the accountants selected, who determined the price payable for the surrender of plaintiff's shares from which the loan balance was subtracted.

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

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

ENTERED: APRIL 22, 2010

David Spoleony

CLERK

Gonzalez, P.J., Saxe, Nardelli, McGuire, Moskowitz, JJ.

2607 The People of the State of New York, Respondent,

SCI 1475/03

-against-

Corey Gamble,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Hannah E.C. Moore of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Martin Marcus, J.), rendered November 19, 2004, convicting defendant, after a jury trial, of murder in the first and second degrees, and sentencing him to an aggregate term of life without parole, and 25 years to life, respectively, unanimously modified, on the law, to the extent of vacating the DNA databank fee, and otherwise affirmed.

The court properly exercised its discretion in precluding background information about one of the victims, offered by defendant to show that unknown persons may have had a motive to kill him. For the purpose of establishing, among other things, that defendant had a motive to kill the victims, the People had introduced evidence of a lengthy ongoing dispute between defendant and the victims, who lived in the apartment above his. Defendant sought to establish that one of the victims was a drug

dealer, had offered to become a confidential informant, and had been beaten by unidentified persons approximately a year and a half before the homicide. The court properly concluded that this evidence was unduly speculative, and that its prejudicial effect outweighed its probative value (*see People v Primo*, 96 NY2d 351 [2001]). Defendant acknowledges that this evidence did not point to the culpability of any particular "third party," but argues that it was relevant to rebut that portion of the People's case that linked defendant to the crime by way of motive. Although the People's evidence of motive closely connected defendant, in particular, to the crime, it did not open the door to generalized, speculative evidence of possible motives by unidentifiable persons. Moreover, apart from defendant's testimony, there was no evidence suggesting that someone other than defendant was the killer. In any event, defendant was able to place some of this evidence before the jury in his own testimony. We also find no violation of defendant's right to present a defense (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]; *see also Spivey v Rocha*, 194 F3d 971, 978 [9th Cir 1999], *cert denied* 531 US 995 [2000][exclusion of evidence of unknown parties' potential motives not constitutional error]).

Defendant has not shown that courtroom seating arrangements made for legitimate security reasons had any impact on his

ability to communicate confidentially with his attorney during trial. Court officers guarding defendant sat somewhat closer to him than normal as the result of information, which defendant does not dispute, that he posed a safety risk. Defense counsel complained that these arrangements impeded confidential communications, but her only request was that the officers "sit at the rail where their seats are normally positioned." The court properly exercised its discretion when it denied that request on the ground that moving the officers' chairs back to the courtroom rail would make a meaningless difference of only two or three inches, creating no enhanced confidentiality, and that the court didn't "understand what all the fuss was about." In the first place, defendant has not shown that the positioning of the officers' chairs enabled them to hear attorney-client conversations made in the quiet tones that would be expected during court proceedings, that the officers had any reason to listen to those conversations, or that they had any reason to repeat them to anyone. In any event, defendant has not shown how moving the officers two or three inches would have made any difference.

The People's uncharged crimes evidence was not excessive or inflammatory. Defendant's pattern of aggressive conduct toward the victims, including specific death threats and menacing with a

handgun, was highly probative of motive and intent (*see People v Dorm*, 12 NY3d 16, 19 [2009]; *People v Bierenbaum*, 301 AD2d 119, 150 [2002], *lv denied* 99 NY2d 626 [2003], *cert denied* 540 US 821 [2003]), and it was not unduly prejudicial. We have considered and rejected defendant's remaining arguments on this subject.

Defendant did not preserve any of his challenges to the prosecutor's opening statement, cross-examination and summation. Defendant either failed to object, made generalized objections, or, when his objections were sustained, did not request any further relief, so that the court's curative action "must be deemed to have corrected the error to the defendant's satisfaction" (*People v Heide*, 84 NY2d 943, 944 [1994]; *see also People v Medina*, 53 NY2d 951, 953 [1981]). We decline to review these claims in the interest of justice. As an alternative holding, we find that, to the extent there were isolated improprieties, the court's actions were sufficient to prevent any prejudice, and there is 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]).

Defendant's pro se claims are without merit.

We perceive no basis for reducing the sentence. However, as

the People concede, since the crime was committed prior to the effective date of the legislation providing for the imposition of a DNA databank fee, that fee should not have been imposed.

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

ENTERED: APRIL 22, 2010

CLERK

Gonzalez, P.J., Saxe, Nardelli, McGuire, Moskowitz, JJ.

2608 In re Zachary M. Berman, Index 260535/07
Petitioner-Appellant,

-against-

State of New York Division of
Housing and Community Renewal,
Respondent-Respondent.

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Zachary M. Berman, appellant pro se.

Gary R. Connor, New York (Aida P. Reyes of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Howard R. Silver J.), entered February 2, 2009, denying the petition seeking, inter alia, to annul respondent New York State Division of Housing and Community Renewal's (DHCR) denial of petitioner's rent overcharge complaint, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

DHCR's determination was not arbitrary and capricious, as it correctly determined that because petitioner's lease was not a renewal lease, the legal regulated rent was $1,600 per month, that is, the rent charged on the base date, which was four years prior to the filing of the rent overcharge complaint on December

1, 2006 (*see* Rent Stablization Law of 1969 [Administrative Code of City of NY] § 26-516[a][2]; Rent Stablization Code [9 NYCRR] § 2526.1[a][3][i]; *Matter of Ellis v Division of Hous. & Community Renewal of State of N.Y.*, 45 AD3d 594, 595 [2007]; *Zafra v Pilkes*, 245 AD2d 218, 219 [1997]). DHCR properly examined the records predating the overcharge claim for four years, going back to December 1, 2002, and based upon those records, found that petitioner had not been overcharged.

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.

ENTERED: APRIL 22, 2010

David Spokony

CLERK

Gonzalez, P.J., Saxe, Nardelli, McGuire, Moskowitz, JJ.

2611 Monica Harrison, et al., Index 113568/06
Plaintiffs-Appellants,

-against-

V.R.H. Construction Corp., et al.,
Defendants-Respondents.

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The Feld Law Firm P.C., New York (John G. Korman of counsel), for appellants.

Lewis, Brisbois, Bisgaard & Smith, LLP, New York (Mark J. Cipolla of counsel), for respondents.

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Order, Supreme Court, New York County (Paul G. Feinman, J.), entered July 13, 2009, which granted defendants' motion for summary judgment dismissing the complaint and denied plaintiffs' cross motion for summary judgment on the issue of liability under Labor Law § 240(1), unanimously modified, on the law, to deny so much of defendants' motion as sought to dismiss the Labor Law § 240(1) claim and to grant plaintiffs' cross motion, and otherwise affirmed, without costs.

By her uncontroverted testimony that the ladder upon which she was working inexplicably "tilted" and caused her to fall, plaintiff Harrison established prima facie defendants' liability under Labor Law § 240(1) (*see Siegel v RRG Fort Greene, Inc.*, 68 AD3d 675, 675 [2009]; *Greenidge v Anchor Constr.*, 303 AD2d 179 [2003]). In opposition, defendants failed to raise an issue of

fact whether plaintiff was the sole cause of the accident (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 n 8 [2003]).

Plaintiff contends that defendants created or had notice of a trench that extended across the floor near the spot where she set up her ladder, and points to two post-accident incident reports that suggest that her ladder moved into the trench, causing her to fall. These accident reports not only are hearsay but also are directly contradicted by plaintiff's own testimony that the legs of the ladder did not move into the trench, and therefore do not suffice to raise an issue of fact whether defendants failed to provide a safe place to work, in violation of Labor Law § 200 (*see Londner v Big V Supermarkets*, 309 AD2d 1122, 1123 [2003]).

There is no evidence in the record that defendants violated any of the Industrial Code provisions upon which plaintiff predicated her Labor Law § 241(6) claim (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]).

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

ENTERED: APRIL 22, 2010

CLERK

Gonzalez, P.J., Saxe, Nardelli, McGuire, Moskowitz, JJ.

2612 The People of the State of New York, Ind. 5715/06
Respondent,

-against-

Andre Rushion,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Jalina J. Hudson of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Allen J. Vickey of counsel), for respondent.

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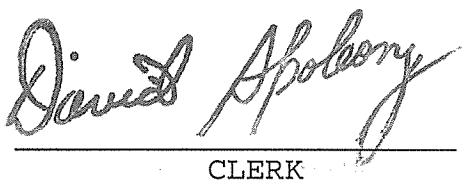
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Daniel FitzGerald, J., at plea and sentence), rendered on or about February 20, 2008,

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: APRIL 22, 2010



CLERK

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

Gonzalez, P.J., Saxe, Nardelli, McGuire, Moskowitz, JJ.

2613 In re Michael Chenkin, Index 107647/07
Petitioner-Appellant,

-against-

New York City Council,
Respondent-Respondent.

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Michael Chenkin, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Norman Corenthal of counsel), for respondent.

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Order, Supreme Court, New York County (Leland G. DeGrasse, J.), entered January 31, 2008, which denied the petition to vacate the appointment or reappointment of Commissioners to the New York City Planning Commission, and dismissed this Article 78 proceeding, unanimously affirmed, without costs.

Petitioner claims good cause to void respondent's February 1, 2007 appointment or reappointment of Nathan Leventhal, Betty Y. Chen, Richard W. Eaddy and Alfred Cerullo III to the Planning Commission, arguing that he was prevented from attending a hearing the previous day before the Council's Committee on Rules, Privileges and Elections, at which it was recommended that the appointees be approved by respondent, in violation of the Open Meetings Law (Public Officers Law, art 7). Petitioner does not claim a failure to comply with the notice provisions under Public

Officers Law § 104. Rather, he contends that upon his arrival at the hearing room prior to the scheduled time for the commencement of the hearing, he found the door closed, and a sign posted nearby that read "Council Members and Staff Only." Upon making inquiry, he was allegedly misinformed by a police officer that the meeting had been rescheduled to a later hour. Even if accurate, these claims fail to demonstrate a violation of the Open Meetings Law, and do not establish good cause for judicial intervention under Public Officers Law § 107[1]). The petition does not directly allege that petitioner was intentionally excluded from the hearing (*cf. Matter of Goetschius v Board of Educ. of Greenburgh Eleven Union Free School Dist.*, 244 AD2d 552 [1997]), or indicate the existence of official action designed to circumvent the Open Meetings Law (*see Matter of Thomas v New York Temporary State Commn. on Regulation of Lobbying*, 83 AD2d 723, 724 [1981], *affd* 56 NY2d 656 [1982]). At most, it shows inadvertence or slight negligence on the part of public officials, which is not a sufficient ground upon which to

invalidate respondent's action (*see Matter of Roberts v Town Bd. of Carmel*, 207 AD2d 404, 405 [1994], *lv denied* 84 NY2d 811 [1994]).

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

ENTERED: APRIL 22, 2010

CLERK

Gonzalez, P.J., Saxe, Nardelli, McGuire, Moskowitz, JJ.

2614 The People of the State of New York, Ind. 6901/06
Respondent,

-against-

David Sanchez,
Defendant-Appellant.

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

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Order, Supreme Court, New York County (Rena K. Uviller, J.), entered on or about May 22, 2009, unanimously affirmed, without costs.

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: APRIL 22, 2010

CLERK

Gonzalez, P.J., Saxe, Nardelli, McGuire, Moskowitz, JJ.

2616 Rosalind Stevens, Index 102796/05
Plaintiff-Appellant,

-against-

The City of New York,
Defendant,

Consolidated Edison Company of New York, Inc.,
Defendant-Respondent.

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Rappaport, Glass, Greene & Levine, LLP, New York (James L. Forde of counsel), for appellant.

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

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Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered March 13, 2009, which, in an action for personal injuries sustained in a trip and fall allegedly caused by a roadway defect, granted defendant Consolidated Edison's motion for summary judgment dismissing the complaint and all cross claims as against it, unanimously reversed, on the law, without costs, and the motion denied.

An issue of fact as to whether Con Ed's cut extended through the crosswalk to the accident site is raised by the photos submitted by plaintiff in opposition to the motion showing a filled trench near the hole. Although it cannot be determined from the photos whether Con Ed made the trench, neither can it be

determined, as Con Ed noted in its brief, whether "the trench is one continuous excavation." Absent evidence that the trench was made by a contractor unaffiliated with Con Ed, summary judgment should have been denied. We need not determine whether Con Ed's reply papers improperly raised new facts based on an investigation at the accident site it conducted after it had been served with plaintiff's opposition (*see Lumbermens Mut. Cas. Co. v Morse Shoe Co.*, 218 AD2d 624, 625-626 [1995]). In any event, one of the photos submitted with the reply papers appears to depict a cut extending through the crosswalk near the location of plaintiff's fall.

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

ENTERED: APRIL 22, 2010

CLERK

Gonzalez, P.J., Saxe, Nardelli, McGuire, Moskowitz, JJ.

2617 The People of the State of New York, Ind. 62277C/05
Respondent,

-against-

Oneil Reid,
Defendant-Appellant.

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Law Offices of Raymond L. Colón, New York (Raymond L. Colón of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Jennifer Marinaccio of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered November 1, 2006, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

Defendant's legal sufficiency argument is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the verdict was based on legally sufficient evidence. Furthermore, 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 credibility determinations, including its evaluation of the eyewitness's delay in identifying her cousin as one of the assailants.

The court properly admitted the testimony of defendant's

former girlfriend that, two days before the homicide, she had broken up with defendant after an argument about the fact she had been talking to the victim. The testimony was relevant to provide a motive for defendant's involvement in the victim's murder (*see generally People v Scarola*, 71 NY2d 769, 777 [1988]), in that it permitted the jury to draw a reasonable, nonspeculative inference that defendant was motivated by jealousy.

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

ENTERED: APRIL 22, 2010

CLERK

Gonzalez, P.J., Saxe, Nardelli, McGuire, Moskowitz, JJ.

2618N Winifred Burch, Index 105835/07
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

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Mark L. Lubelsky & Associates, New York (Mark L. Lubelsky of counsel), for appellant.

Cullen and Dykman, LLP, Brooklyn (Andrew Giuseppe Vassalle of counsel), for respondent.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered August 20, 2009, which, in an action for personal injuries allegedly sustained in a slip and fall down a staircase in defendant's building, denied plaintiff's motion to strike defendant's answer, unanimously affirmed, without costs.

The motion court providently exercised its discretion in denying plaintiff's request for spoliation sanctions predicated on the loss of the personal handwritten notes of defendant's employee. There is no evidence that defendant intentionally or negligently disposed of the notes with knowledge of their evidentiary value to plaintiff or plaintiff's claimed need for them (*see Diaz v Rose*, 40 AD3d 429 [2007]; *Herbert v City of New York*, 12 AD3d 209, 210 [2004]). The employee was under no duty to make the notes, which were not prepared in the regular course

of defendant's business, and upon learning of the existence of the notes, defendant undertook a search of the location they were last known to be kept, and could not find them (*see Voultepsis v Gumley-Haft-Klierer, Inc.*, 60 AD3d 524, 526 [2009]). Nor did defendant willfully fail to comply with the discovery orders of the court (*see Hernandez v Pace El. Inc.*, 69 AD3d 493 [2010]). The record shows that defendant timely responded to plaintiff's notice of discovery and inspection by providing all the documents that were in its possession responsive to plaintiff's requests.

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

ENTERED: APRIL 22, 2010

CLERK

Friedman, J.P., Catterson, Acosta, DeGrasse, Abdus-Salaam, JJ.

2075 The People of the State of New York, Ind. 6637/03
Respondent,

-against-

Rafael Sanabria,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Patricia Curran of counsel), for respondent.

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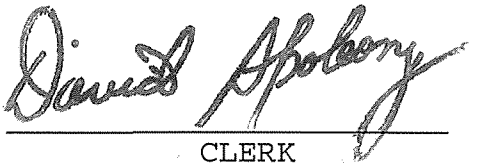
Judgment, Supreme Court, New York County (Budd G. Goodman, J.), rendered December 12, 2005, convicting defendant, after a jury trial, of rape in the first degree, criminal sexual act in the first degree, and two counts of sexual abuse in the first degree, and sentencing him to an aggregate term of 21 years, unanimously reversed, on the law, and the matter remanded for a new trial.

The trial court erred in precluding the defense from investigating the complainant's prior claims of molestation by her doctors. If proven to be false, these claims could have been used to challenge the mentally ill witness's veracity as to her

account of what happened here (*see People v Hunter*, 11 NY3d 1 [2008]). Under the facts of this case, this error cannot be deemed harmless.

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

ENTERED: APRIL 22, 2010



CLERK

Andrias, J.P., Saxe, Catterson, Freedman, Abdus-Salaam, JJ.

2516-
2517 Glorya F. Cabrera, Index 17889/05
Plaintiff-Appellant,

-against-

Hermina E. Gilpin, et al.,
Defendants-Respondents.

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Ginsberg & Broome, P.C., New York (Robert M. Ginsberg of counsel), for appellant.

Richard T. Lau & Associates, Jericho (Linda Meisler of counsel), for respondents.

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Order, Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered April 9, 2009, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs. Order, same court (Barry Salman, J.), entered October 20, 2009, insofar as it denied plaintiff's motion for renewal, unanimously affirmed, without costs. Appeal from that part of the October 20, 2009 order that denied plaintiff's motion for reargument unanimously dismissed, without costs, as taken from a nonappealable paper.

Defendants demonstrated prima facie that plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102(d) through the affirmed reports of an orthopedist who found no limitations in range of motion in her cervical and lumber spine,

shoulders, knees and ankles and opined that any injuries to those areas had resolved, a neurologist who reported a normal neurological examination and no objective neurological findings to support cervical or lumbosacral radiculopathy or carpal tunnel syndrome, and a radiologist who opined that an MRI taken of plaintiff before the instant accident revealed a degenerative disc condition not attributable to trauma.

In opposition, plaintiff submitted her doctor's affirmation in which he stated that he treated plaintiff before the accident and then again six months after the accident; she submitted no objective medical evidence contemporaneous with the accident (*see Toulson v Young Han Pae*, 13 AD3d 317, 319 [2004]). Moreover, her doctor failed to address the conclusion of defendants' radiologist that plaintiff's condition was the result of a degenerative disease (*see Valentin v Pomilla*, 59 AD3d 184 [2009]).

On her motion for renewal, plaintiff failed to provide a reasonable justification for her failure to present the "new

facts" in her original opposition to defendants' motion (*see American Audio Serv. Bur. Inc. v AT & T Corp.*, 33 AD3d 473, 476 [2006]). In any event, her doctor's affirmation did not fill in all the gaps in his earlier affirmation.

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

ENTERED: APRIL 22, 2010

David Spolony

CLERK

Andrias, J.P., Saxe, Catterson, Freedman, Abdus-Salaam, JJ.

2518 Glorya F. Cabrera, Index 15792/05
Plaintiff-Appellant,

-against-

Ramon F. Rodriguez,
Defendant,

Cerda Corp.,
Defendant-Respondent.

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Ginsberg & Broome, P.C., New York (Robert M. Ginsberg of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for respondent.

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Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered December 11, 2008, which denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously reversed, on the law, without costs, and the motion granted.

It is well settled that a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle, and imposes a duty on the part of the operator of the moving vehicle to come forward with an adequate non-negligent explanation for the accident (*see Tutrani v County of Suffolk*, 10 NY3d 906, 908 [2008]; *Agramonte v City of New York*, 288 AD2d 75, 76 [2001]).

A claim that the driver of the lead vehicle made a sudden

stop, standing alone, is insufficient to rebut the presumption of negligence (*see id.; Farrington v New York City Tr. Authority*, 33 AD3d 332 [2006] [defendant first saw stopped vehicle three or four seconds before impact; even if brake lights not functioning, such failure would not adequately rebut inference of defendant's negligence]; *Francisco v Schoepfer*, 30 AD3d 275 [2006]; *Mullen v Rigor*, 8 AD3d 104 [2004] [claim that co-defendant's car stopped suddenly not enough to rebut the presumption of negligence where there was no testimony as to why a safe distance could not be maintained]).

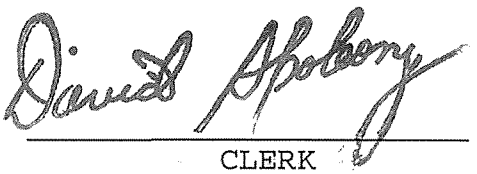
Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to raise a triable issue of fact (*see Alvord & Swift v Muller Constr. Corp.*, 46 NY2d 276, 281-282 [1978]).

The motion court erred in finding that "right of way issues" are raised by defendant driver's deposition testimony that plaintiff was "moving and perhaps changing lanes at the time of the accident." Defendant driver did not dispute that plaintiff's vehicle was stopped when defendant hit it. The most that can be

said in defendant's favor is that plaintiff was attempting to move out of, not into, defendant driver's lane of traffic to get around a double-parked car. There is no allegation that plaintiff suddenly moved into defendant's lane.

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

ENTERED: APRIL 22, 2010



CLERK

Tom, J.P., Mazzarelli, Acosta, DeGrasse, Richter, JJ.

2581 The People of the State of New York, Ind. 4833/07
Respondent,

-against-

Regina Krasso,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Paula-Rose Stark of counsel), for respondent.

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Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered October 24, 2008, convicting defendant, upon her plea of guilty, of four counts of criminal possession of a forged instrument in the second degree, and sentencing her, as a second felony offender, to concurrent terms of 3 to 6 years, unanimously affirmed.

The court properly denied defendant's motion to withdraw her guilty plea (*see People v Frederick*, 45 NY2d 520 [1978]). "[T]he nature and extent of the fact-finding procedures on such motions rest largely in the discretion of the court" (*People v Fiumefreddo*, 82 NY2d 536, 544 [1993]). The record establishes that the plea was voluntary, and that no hearing was necessary. Defendant's claim that her plea was induced by an off-the-record promise by her attorney was contradicted by the thorough plea

colloquy. We have considered and rejected defendant's challenges to the procedures employed by the court in determining the motion.

Since defendant's additional argument concerning the factual recitations in her plea allocution was not raised in her plea withdrawal motion, and since this case does not come within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662 [1988]), that challenge to the plea is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. There was nothing in the plea allocution that cast significant doubt on defendant's guilt (*see People v Toxey*, 86 NY2d 725 [1995]). When, during the plea colloquy, defendant made statements that could be viewed as exculpatory, the court made careful inquiries that made clear she was admitting her guilt (*see People v McNair*, 13 NY3d 821 [2009]).

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 22, 2010

David Spolzino

CLERK

Tom, J.P., Mazzarelli, Acosta, DeGrasse, Richter, JJ.

2582 In re Derrick R.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

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Presentment Agency

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Tamara A. Steckler, The Legal Aid Society, New York (Diane Pazar of counsel), Law Guardian.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondent.

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Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about July 2, 2009, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crimes of grand larceny in the fourth degree and jostling, and placed him on probation for a period of 15 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing its determinations that the victim's identification testimony was reliable, and that the alibi witness's testimony did not raise a reasonable doubt as to appellant's guilt, since

the witness based her testimony primarily on her knowledge of appellant's normal routine and could have been mistaken about the particular day of the incident.

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

ENTERED: APRIL 22, 2010

CLERK

Tom, J.P., Mazzarelli, Acosta, DeGrasse, Richter, JJ.

2583 The People of the State of New York, Ind. 4681/03
Respondent,

-against-

Jonathan Fernandez,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Megan Tallmer, J., at hearing, plea and sentence), rendered on or about January 23, 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: APRIL 22, 2010

CLERK

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

Tom, J.P., Mazzarelli, Acosta, DeGrasse, Richter, JJ.

2584 Angelina Bisogno, Index 102215/08
Plaintiff-Appellant,

-against-

333 Tenants Corp. Co-Op, et al.,
Defendants-Respondents.

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Finz & Finz, P.C., Mineola (Jay L. Feigenbaum of counsel), for appellant.

Fixler & LaGattuta, LLP, New York (Paul F. LaGattuta, III of counsel), for respondents.

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Appeal from order, Supreme Court, New York County (Edward H. Lehner, J.), entered November 2, 2009, which granted defendants' motion for summary judgment dismissing the complaint, deemed an appeal from judgment, same court and Justice, entered December 23, 2009 (CPLR 5501[c]), and so considered, said judgment unanimously affirmed, without costs.

In opposition to defendants' prima facie showing that they did not create an unreasonably dangerous condition by placing a pile of Christmas trees near the curb on the sidewalk in front of their building, plaintiff failed to raise an issue of fact whether defendants had notice of a tripping hazard that allegedly resulted when the trees were moved by an unknown person or

persons some time between their placement on the sidewalk and plaintiff's fall later that morning (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]).

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

ENTERED: APRIL 22, 2010

CLERK

Tom, J.P., Mazzarelli, Acosta, DeGrasse, Richter, JJ.

2586 Cornealius Campbell, Index 303309/04
Plaintiff-Respondent,

-against-

Anita Brown Campbell,
Defendant-Appellant.

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Anita Brown Campbell, appellant pro se.

Robert Litwack, Forest Hills, for respondent.

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Judgment, Supreme Court, New York County (Laura Drager, J.), entered March 20, 2008, following nonjury trials (Saralee Evans, J., on grounds; Laura Drager, J., on financial issues), granting plaintiff a divorce on the ground of cruel and inhuman treatment, distributing the marital assets and awarding defendant weekly maintenance in the amount of $100 for three years, unanimously affirmed, without costs.

Plaintiff's testimony that defendant threw him out of the marital home in February 2002 and that he ended up in a homeless shelter; that she subjected him, inter alia, to constant unrelenting verbal abuse during the marriage and incessant calls to his workplace, threatening his job and informing coworkers that he was a crack addict; that she had him detained in a hospital psychiatric unit on false charges that he was a danger to her and to himself; and that, anxious and depressed, he

developed stomach pains and had difficulty eating, and sought counseling amply established that defendant's conduct endangered plaintiff's mental well-being and constituted cruel and inhuman treatment (*see Xiaokang Xu v Xiaoling Shirley He*, 24 AD3d 862 [2005], *lv denied* 6 NY3d 710 [2006]; *Stoothoff v Stoothoff*, 226 AD2d 209 [1996]; *Smith v Smith*, 206 AD2d 255 [1994], *lv dismissed* 84 NY2d 977 [1994]). While defendant denied plaintiff's allegations, the court, as trier of fact, evidently rejected her version, and its credibility determination is entitled to deference (*Stoothoff*, 226 AD2d at 209).

In view of defendant's failure, despite several court orders, to provide full financial disclosure, and the court's consequent inability to fully assess the sources of funds available to her, she may not be heard to complain that the maintenance award was inadequate (*see Shortis v Shortis*, 274 AD2d 880, 882-883 [2000]). The lack of disclosure notwithstanding, the court endeavored to make an equitable award, taking into consideration the testimony adduced at trial and the relevant statutory factors, including the parties' standard of living during the marriage and the resources available to them, and its

determination was a proper exercise of discretion (*see Naimollah v De Ugarte*, 18 AD3d 268, 271 [2005]).

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

ENTERED: APRIL 22, 2010

CLERK

Tom, J.P., Mazzarelli, Acosta, DeGrasse, Richter, JJ.

2587 The People of the State of New York, Ind. 426/07
Respondent,

-against-

Ellison S. Champagne,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Craig A. Ascher of counsel), for respondent.

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Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered February 4, 2009, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree, and sentencing him to a term of 5 years' probation, unanimously affirmed.

The court properly exercised its discretion in denying defendant's motion to withdraw his guilty plea. The record establishes that defendant's favorable plea was knowing, intelligent and voluntary (*People v Fiumefreddo*, 82 NY2d 536, 542-44 [1993]). Defendant, who presented his claim of innocence through his written submission and declined to address the court, received a sufficient opportunity to advance his claim, and the record supports the court's rejection, as unreliable, of the

purportedly exculpatory evidence he presented (*see e.g. People v Randall*, 22 AD3d 261 [2005], *lv denied* 6 NY3d 852 [2006]).

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 22, 2010

CLERK

Tom, J.P., Mazzarelli, Acosta, DeGrasse, Richter, JJ.

2588 In re Joseph Davids, Index 113038/07
Petitioner-Appellant,

-against-

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

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Seelig & Ungaro, LLP, New York (Philip H. Seelig of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Joan A. Madden, J.), entered March 26, 2009, which denied the petition seeking, inter alia, to annul respondents' determination demoting petitioner from the rank of probationary captain to his permanent title of lieutenant, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The record discloses a rational basis for petitioner's demotion, as the evidence amply supports the conclusion that his job performance was unsatisfactory (*see Matter of Johnson v Katz*, 68 NY2d 649, 650 [1986]). Petitioner did not meet his burden of establishing that the demotion was made in bad faith (*see e.g. Matter of Chow v City of N.Y. Dept. of Health*, 303 AD2d 237 [2003]). Although respondents technically failed to follow the

procedures for conducting and preparing petitioner's performance evaluations, the delays were undertaken in an attempt to provide petitioner with time to bring his performance up to department standards and did not evince bad faith (*see e.g. Matter of Smith v City of New York*, 118 Misc 2d 227 [1983]).

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

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

ENTERED: APRIL 22, 2010

CLERK

Tom, J.P., Mazzarelli, Acosta, DeGrasse, Richter, JJ.

2589-
2590 The People of the State of New York, Ind. 3481/04
Respondent,

-against-

Mario Colon, etc.,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Kayonia L. Whetstone of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Steven Lloyd Barrett, J.), rendered May 4, 2006, convicting defendant, upon his plea of guilty, of grand larceny in the second degree, and sentencing him to a term of 1 to 3 years, and order, same court and Justice, entered on or about July 28, 2008, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

After a thorough hearing on the CPL 440.10 motion, the court properly found that defendant's plea was voluntary and that it was made with effective assistance of counsel (*see People v Ford*, 86 NY2d 397, 404 [1995]). There is no basis for disturbing the court's determinations concerning credibility. The record of the

plea, sentencing and hearing completely refutes defendant's present claims.

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

ENTERED: APRIL 22, 2010

CLERK

Tom, J.P., Mazzarelli, Acosta, DeGrasse, Richter, JJ.

2591 Brian W. Baxter, etc., Index 303121/07
Plaintiff-Appellant,

-against-

Columbia University, et al.,
Defendants-Respondents.

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Brian W. Baxter, appellant pro se.

Lankler Siffert & Wohl LLP, New York (Charles T. Spada of counsel), for Columbia University, respondent.

Zeichner Ellman & Krause LLP, New York (Barry J. Glickman of counsel), for Citibank N.A. and Nancy Harsh, respondents.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered October 17, 2008, which granted the motion by defendants Harsh and Citibank to dismiss the complaint as against them, unanimously affirmed, without costs.

This is an action alleging that Columbia University had a policy of steering its students to a certain bank as the preferred lender for student loans.[1] The applicable six-year statute of limitations (CPLR 213) has long since expired on all of plaintiff's claims, whether as to breach of contract, fraud or deceptive business practices, since plaintiff did not commence

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[1]Columbia has submitted a responding brief, even though plaintiff has failed to pursue a purported appeal from the judgment (same court and Justice), entered December 5, 2008, dismissing the complaint against that party defendant.

this action until more than thirteen years after he last attended Columbia. Although a party may bring a claim for fraud two years after discovery of the fraud (CPLR 213[8]), not only does plaintiff concede that the complaint failed to specify the date of discovery, but such an extension does not apply to constructive fraud (*Monaco v New York Univ. Med. Ctr.*, 213 AD2d 167, 168 [1995], *lv denied* 86 NY2d 882 [1995]). At best, plaintiff has stated a defectively pleaded claim for constructive, rather than actual, fraud.

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

ENTERED: APRIL 22, 2010

CLERK

Tom, J.P., Mazzarelli, Acosta, DeGrasse, Richter, JJ.

2595 The People of the State of New York, Ind. 2794/07
Respondent,

-against-

Paul Alexander,
Defendant-Appellant.

---

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

Cyrus R. Vance, Jr., District Attorney, New York (Brian E. Rodkey of counsel), for respondent.

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Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered July 17, 2008, convicting defendant, after a jury trial, of bribery in the third degree and unlawful possession of marijuana, and sentencing him, as a second felony offender, to an aggregate term of 3 to 6 years, unanimously affirmed.

Defendant's ineffective assistance of counsel claims, including those raised in his pro se supplemental brief, are unreviewable on direct appeal because they involve counsel's strategic decisions and other matters outside the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). 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 particular, counsel had no reason to request instructions on the defenses of duress (Penal Law § 40.00) or emergency justification (Penal Law § 35.05[2]) because those defenses had no applicability to the facts. Even assuming that, when viewed most favorably to defendant, the evidence supports a theory that defendant's offer of an unsolicited bribe to avoid arrest was the result of violent threats by the officer, that theory would still not support these defenses. There was no evidence that defendant had been threatened with imminent harm, and his remedy, under the view of the facts posited on appeal, would have been to report the officer's threats to the proper authorities instead of offering him an unsolicited bribe. We note that defendant concedes that the evidence did not support the extortion/coercion defense to bribery (Penal Law § 200.05). In any event, regardless of whether counsel should have asked for instructions on these additional defenses, the lack of those instructions could not have prejudiced defendant because neither of these defenses had any hope of success.

With regard to defendant's challenges to the court's responses to jury notes, the only one that is arguably preserved is his claim that the court should not have specifically told the

jury that although there is an extortion/coercion defense to bribery, that defense was not made out and thus could not be considered. We reject that argument, because, as defendant now concedes, the defense was not made out, and it was appropriate in light of the defense summation and the jury's note to put that issue to rest by telling the jury the court "had made a legal determination that this defense did not apply" (*People v Moreno*, 58 AD3d 516, 518 [2009], *lv denied* 12 NY3d 819 [2009]). Defendant did not preserve any other challenges to the court's supplemental jury instructions and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

We perceive no basis for reducing the sentence.

We have considered and rejected defendant's remaining pro se claims.

**M-1457 - *People v Paul Alexander***

Motion seeking leave to file a pro se supplemental reply brief denied.

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

ENTERED: APRIL 22, 2010

CLERK

Tom, P.J., Mazzarelli, Acosta, DeGrasse, Richter, JJ.

2596 L&L Mechanical Services, Inc., Index 603229/08
Plaintiff-Appellant,

-against-

Garadice, Inc.,
Defendant-Respondent,

Rodney Miller,
Defendant.

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Pashman Stein, P.C., New York (Adam B. Schwartz of counsel), for appellant.

Cunningham & Cunningham LLP, New York (Brian G. Cunningham of counsel), for respondent.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered August 17, 2009, which granted defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, the motion denied with respect to the first through fourth causes of action, which are reinstated, and otherwise affirmed, without costs.

Plaintiff was hired by defendant general contractor to provide plumbing and HVAC (heating, ventilating and air conditioning) services for the construction of defendant Miller's residence. Since plaintiff was concededly not a licensed master plumber, it subcontracted with Bronx Water and Sewer, which was, to install a sewer line from the street to the house, and also

hired Wagner and Ziv Plumbing, another licensed master plumber, to supervise the remaining plumbing work of plaintiff's workers. When the job was finished, defendants refused to pay the outstanding invoices.

Defendants averred that none of the plumbing work was performed by, or under the direct and continuing supervision of, a master plumber (*see* New York City Administrative Code § 26-142[a][1]). The general contractor's principal claimed he was on the site regularly and never saw any master plumber supervising activities, although he did observe plaintiff's workers engaged in plumbing work. In granting summary judgment, the court found it undisputed that plaintiff was not a licensed master plumber.

There are no allegations, nor did the court find, that plaintiff's HVAC work fell under the Administrative Code's licensing requirements for plumbers or any other relevant services. Defendants were thus not entitled to summary judgment on plaintiff's claim for monies due and owing in connection with those services. Moreover, how much of the outstanding invoice balances pertain to the completed HVAC work remains unresolved.

Plaintiff does not claim it performed the work on the sewer line, but rather maintains it hired the properly licensed Bronx Water and Sewer to perform that work. Just as the general contractor, which was not licensed as a plumber, subcontracted

the sewer line work to plaintiff, the latter allegedly subcontracted that work to a licensed master plumber, whom plaintiff subsequently paid. Defendants have not substantively controverted plaintiff's claims in this regard, which are supported by the inclusion in the record of the agreement between plaintiff and the plumbing subcontractor. Since plaintiff contracted with defendants to provide plumbing *services*, rather than performance, and since the performance in this regard was purportedly provided by a licensed master plumber, it cannot be concluded that the Administrative Code's licensing provisions were violated in this regard. However, plaintiff failed to adequately rebut defendants' factual averments, except in conclusory and unsupported terms, with respect to the performance of the remainder of the plumbing work, especially with regard to the nature and scope of the purported supervision by Wagner and Ziv, supporting the conclusion that the Code's licensing provisions may have been violated to this extent. But such a violation would not have warranted forfeiture of plaintiff's fee on this basis (*Matter of Migdal Plumbing & Heating Corp. [Dakar Devs.]*, 232 AD2d 62, 65 [1997], *lv denied* 91 NY2d 808 [1998]). Even were we to conclude that plaintiff's inadequate showing entitled defendants to dismissal of the claims as they related to that aspect of the plumbing, there would again remain unresolved

factual issues regarding what portion of those outstanding balances pertained to the plumbing or to the HVAC work.

Plaintiff's failure to file an affidavit regarding its service of the notice of lien upon the general contractor (*see* Lien Law § 11) constituted a fatal defect to the lien (*146 W. 45th St. Corp. v McNally,* 188 AD2d 410 [1992]; *Matter of Hui's Realty v Transcontinental Constr. Servs.*, 168 AD2d 302 [1990], *lv denied* 77 NY2d 810 [1991]), as did its failure to comply with § 17 with respect to untimely filing of the notice of pendency (*see Kellett's Well Boring v City of New York,* 292 AD2d 179 [2002]).

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

ENTERED: APRIL 22, 2010

CLERK

Tom, J.P., Mazzarelli, Acosta, DeGrasse, Richter, JJ.

2597 Deephaven Distressed Opportunities Trading, Ltd., et al., Plaintiffs, Index 600610/08 590803/08

-against-

3V Capital Master Fund Ltd., Defendant.

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3V Capital Master Fund Ltd., Third-Party Plaintiff-Respondent,

-against-

Imperial Capital LLC, Third-Party Defendant-Appellant,

Post Distressed Master Fund, LP, et al., Third-Party Defendants.

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Friedman Kaplan Seiler & Adelman LLP, New York (Andrew W. Goldwater of counsel), for appellant.

Stagg, Terenzi, Confusione & Wabnik, LLP, Garden City (Andrew Kazin of counsel), for respondent.

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Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered October 22, 2009, which, to the extent appealed from as limited by the briefs, denied third-party defendant broker Imperial Capital LLC's motion to compel arbitration, unanimously affirmed, with costs.

The subject arbitration clause provided that third-party plaintiff 3V Capital Master Fund Ltd. had agreed to the "clearing" terms of the brokerage agreement between itself, among

other hedge funds, and Imperial. The brokerage agreement provided that in light of 3V's agreement to maintain an account in the name of its prime broker, Imperial agreed that controversies arising between itself and 3V would be determined by arbitration. The first paragraph of the brokerage agreement stated that the agreement set forth the terms and conditions under which Imperial would clear 3V's securities transactions through the facilities of a prime broker, pursuant to a fully disclosed clearing agreement. The language of the foregoing arbitration clause narrowed the scope of arbitrable controversies between the parties to the brokerage agreement (*see Gerling Global Reins. Corp. v Home Ins. Co.*, 302 AD2d 118, 126 [2002], *lv denied* 99 NY2d 511 [2003]). Imperial failed to demonstrate that 3V's claims against it had any relation to the type of transactions covered under the brokerage agreement.

While Imperial urges arbitration in the interest of judicial economy, we have held that arbitration clauses, like contractual agreements, are to be enforced according to their terms, the

potential for bifurcated litigation notwithstanding (*see PNE Media v Cistrone*, 294 AD2d 143, 144 [2002]).

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

ENTERED: APRIL 22, 2010

CLERK

Tom, J.P., Mazzarelli, Acosta, DeGrasse, Richter, JJ.

2598 Illinois National Insurance Company, et al., Plaintiffs-Respondents, Index 604466/05

-against-

General Star Indemnity Company, Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Jane S. Solomon, J.), entered on or about December 8, 2008,

It is unanimously ordered that said appeal be and the same is hereby withdrawn upon the communication from the parties.

ENTERED: APRIL 22, 2010

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
Angela M. Mazzarelli
John W. Sweeny, Jr.
Dianne T. Renwick
Rosalyn T. Richter, JJ.

Index 102500/06
590363/06
591031/06

1242

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Indemnity Insurance Company of North America,
Plaintiff-Appellant,

-against-

St. Paul Mercury Insurance Company, et al.,
Defendants-Respondents.

[And Other Actions]

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Plaintiff appeals from an order of the Supreme Court, New York County (Marylin G. Diamond, J.), entered February 21, 2008, which denied its cross motions for summary judgment against St. Paul Mercury Insurance Company and Yonkers Contracting Company, Inc. and granted St. Paul's and Yonkers's motions for summary judgment dismissing the complaint.

Nixon Peabody LLP, New York (Aidan M. McCormack, Mark L. Deckman and Jonathan Schapp of counsel), for appellant.

Lazare Potter & Giacovas, LLP, New York (Stephen M. Lazare of counsel), for St. Paul Mercury Insurance Company, respondent.

Nicoletti, Hornig & Sweeney, New York (Barbara A. Sheehan and Lawrence C. Glynn of counsel), for Yonkers Contracting Company, Inc., respondent.

RICHTER, J.

In this insurance coverage dispute, plaintiff Insurance Indemnity Company of North America (IICNA) seeks reimbursement from defendants St. Paul Mercury Insurance Company (St. Paul) and Yonkers Contracting Company, Inc. (Yonkers) for a $2 million payment IICNA made to settle an underlying personal injury suit. In the underlying action, Eugene Flood, an employee of Yonkers, was performing restoration work on the Manhattan Bridge when he was injured. Yonkers was retained by the City of New York as the general contractor on the restoration project. As part of this project, Yonkers hired subcontractor Romano Enterprises of New York, Inc. (Romano) to paint certain portions of the bridge. In painting the bridge, Romano had draped a series of steel cables along the sides of the bridge to serve as supports from which to hang scaffolding.

Two days before Flood's accident, Ronald Taylor, a Yonkers superintendent, spotted a cable left on the bridge by Romano that would interfere with Yonkers's work. Taylor asked John Graham, a Romano foreman, to remove the cable. Flood also told Graham that the cable had to be removed. Graham assured both men that he would make sure the cable was taken down, but failed to do so. On the day of the accident, Yonkers workers attempted to hoist a five-ton iron beam horizontally through the bridge's lattices and

suspension cables. Halfway through the process, the beam became stuck on the cable left by Romano. Flood climbed onto the beam to investigate and walked along its length looking for the obstruction. As he reached the end of the beam, the beam tilted and Romano's cable snapped, hitting Flood in the ankle and injuring him.

Under its subcontract with Yonkers, Romano agreed to (1) indemnify and hold harmless the City and Yonkers from any claims arising from or in connection with any acts or omissions in the performance of Romano's work and (2) procure all necessary and adequate insurance naming the City and Yonkers as additional insureds. In accordance with the subcontract, Romano obtained a policy with nonparty Royal Insurance Company of America (Royal), which provided for $1 million in primary general liability coverage. Romano's excess insurer, IICNA, supplied umbrella excess liability coverage in the amount of $10 million. The City and Yonkers were additional insureds under both the Royal and IICNA policies. St. Paul insured Yonkers, and the City as an additional insured, under a commercial policy with general liability coverage of $1 million and umbrella coverage of $5 million.

In January 2001, Flood commenced the underlying action against the City and Romano, asserting claims under the Labor Law

as well as under principles of common-law negligence.[1] The City tendered its defense to St. Paul, which then assigned counsel to represent the City. Romano was represented by counsel assigned by its carrier, Royal. Several months later, St. Paul asked Romano to assume the City's defense and indemnification pursuant to the indemnification clause in the Yonkers-Romano subcontract. Romano agreed that its indemnification obligation to the City was clear and recommended that Royal accept tender of the City's defense. In response, Royal agreed to indemnify and defend the City without reservation or qualification.

Trial of Flood's personal injury action began in February 2003. Soon thereafter, Royal tendered the defense of the City and Romano to IICNA since it appeared that Flood's claim would exceed Royal's policy limits. After opening statements, the court granted Flood's motion for a directed verdict against the City as to liability on his Labor Law § 240(1) claim, finding the City vicariously liable as the owner of the bridge.

On February 10, 2003, after Flood's case rested on the remaining issues, IICNA settled the case for $3 million. IICNA negotiated the settlement whereby Royal would pay $1 million and IICNA the $2 million balance. Flood's counsel stated on the

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[1] Yonkers was never made a party to the underlying litigation.

record that the settlement was made with respect to Flood's claim against the City and that his client's claims against Romano would be discontinued with prejudice. However, the general release stated that the settlement amount was paid on behalf of both the City and Romano. St. Paul did not participate in the settlement agreement, having concluded that Romano was ultimately liable as a result of its agreement to indemnify the City, a position that Romano had previously agreed with.

IICNA subsequently commenced this action against St. Paul and Yonkers, seeking to recoup the $2 million it had paid to settle the underlying action. In the first cause of action, brought against St. Paul, IICNA maintained that the St. Paul policy covering the City was the primary insurance covering the loss at issue. IICNA sought a declaration that the IICNA policy is excess to the St. Paul policy, thus obligating St. Paul to reimburse IICNA the $2 million it paid to Flood. In the second cause of action, sounding in subrogation, IICNA sought a judgment against Yonkers in the amount of $2 million. IICNA contended that Yonkers was contractually obligated to indemnify the City and thus was responsible for reimbursing IICNA for the payment IICNA made purportedly on the City's behalf. The motion court denied IICNA's cross motions for summary judgment as against Yonkers and St. Paul and granted St. Paul's and Yonkers's motions

for summary judgment dismissing the complaint.

We conclude that IICNA is not entitled to reimbursement from St. Paul because St. Paul neither participated in the settlement negotiations nor agreed to the amount of the settlement. In *AIU Ins. Co. v Valley Forge Ins. Co.* (303 AD2d 325 [2003]), this Court found that where the insurer did not take part in settlement negotiations or agree to the settlement of an underlying personal injury action, it was not required to contribute to that settlement. Similarly here, IICNA, which orchestrated the underlying settlement, did not have the authority to bind St. Paul. We also note that the St. Paul insurance policy prohibited the City from assuming any financial obligation without St. Paul's consent (*see Royal Zenith Corp. v New York Mar. Mgrs*, 192 AD2d 390 [1993]). Since it is undisputed that St. Paul did not consent to the settlement, IICNA may not seek reimbursement from St. Paul.

There is no merit to IICNA's claim that St. Paul abandoned its insured, the City. In fact, St. Paul tendered the City's defense to Romano pursuant to Romano's contractual obligation to indemnify the City. Upon such tender, Romano and its insurer, Royal, unconditionally and without reservation agreed to defend and indemnify the City. Under these circumstances, it cannot be said that St. Paul abandoned its insured. Nor, as IICNA argues,

did St. Paul take an improper coverage position when it declined to participate in the settlement. St. Paul correctly determined that the City, whose liability was purely statutory, was entitled to contractual indemnification from Romano and a complete pass-through of liability to Romano and its insurers, Royal and IICNA (*see AIU Ins. Co.*, 303 AD2d at 325-326).

IICNA unpersuasively argues that the City could not transfer its liability to Romano because the accident was not caused by Romano's negligence. However, the contract between Romano and Yonkers did not require any showing of negligence on Romano's part. Instead, it required Romano to indemnify the City from any claims "arising from or in connection with any acts or omissions" in the performance of Romano's work. It is undisputed that Flood's injury occurred when a cable installed by Romano as part of the restoration project, and that Romano failed to remove, obstructed the work being performed, and snapped and hit Flood in the ankle. Thus, there can be no question that the accident arose from and was connected with Romano's act or omission (*see Masciotta v Morse Diesel Int'l*, 303 AD2d 309 [2003]).

There is no merit to IICNA's argument that the St. Paul policy covering the City as an additional insured must be exhausted prior to the application of the IICNA policy. In determining priority of coverage among different insurers

covering the same risk, a court must consider the intended purpose of each policy "as evidenced by both its stated coverage and the premium paid for it, as well as . . . the wording of its provision concerning excess insurance" (*Tishman Constr. Corp. of N.Y. v Great Am. Ins. Co.*, 53 AD3d 416, 419 [2008] [internal quotation marks and citation omitted]). Here, however, priority of coverage is irrelevant. Even if St. Paul's coverage of the City were primary to that of IICNA, the City's liability still would pass through to Romano and its insurers, Royal and IICNA. This is particularly so because Romano accepted tender of the City's defense and unconditionally and without reservation agreed to defend and indemnify the City. In light of this, and of the fact that IICNA settled the action without the consent of St. Paul, IICNA's claim for reimbursement from St. Paul must fail (*see AIU Ins. Co.*, 303 AD2d at 325).

In its second cause of action, brought in subrogation, IICNA alleged that Yonkers was responsible for reimbursing IICNA for the $2 million it paid on the City's behalf. Subrogation is an equitable doctrine that "allows an insurer to stand in the shoes of its insured and seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse" (*Kaf-Kaf, Inc. v Rodless Decorations*, 90 NY2d 654, 660 [1997]). However, under the antisubrogation rule, an insurer

"has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered" (*North Star Reins. Corp. v Continental Ins. Co.*, 82 NY2d 281, 294 [1993]).

IICNA's claim against Yonkers is barred by the antisubrogation rule because Yonkers was an additional insured under the excess policy issued by IICNA. That policy includes as an insured any entity included as an additional insured under the underlying Royal policy. The Royal policy, in turn, provides that "[a]ny person or organization [Romano is] required by written contract . . . to name as an insured is an insured but only with respect to liability arising out of . . . '[Romano's] work' performed for that insured."

In a similarly worded additional insured provision, the phrase "arising out of" was interpreted by the Court of Appeals "to 'mean originating from, incident to, or having connection with,' and requires 'only that there be some causal relationship between the injury and the risk for which coverage is provided'" (*Worth Constr. Co., Inc. v Admiral Ins. Co.*, 10 NY3d 411, 415 [2008] [citations omitted]). The focus "is not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained" (*id.* at 416 [internal quotation marks and citation omitted]).

There is no question that the liability here arose out of Romano's work. Flood's injury occurred because Romano failed to remove a cable it had erected, despite being requested to do so. That same cable obstructed the work being performed by Yonkers, and when Flood went to investigate, it snapped and hit him in the ankle. Accordingly, since Yonkers was an additional insured under the IICNA policy, IICNA is barred by the antisubrogation rule from seeking reimbursement from Yonkers.

We modify only to declare in St. Paul's favor (*see Lanza v Wagner*, 11 NY2d 317, 334 [1962], *cert denied* 371 US 901 [1962]).

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

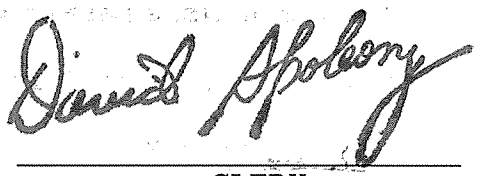
Accordingly, the order of Supreme Court, New York County (Marylin G. Diamond, J.), entered February 21, 2008, which denied IICNA's cross motions for summary judgment against St. Paul and Yonkers and granted St. Paul's and Yonkers's motions for summary judgment dismissing the complaint, should be modified, on the law, to declare that St. Paul is not obligated to indemnify IICNA

in the amount of $2 million, and otherwise affirmed, without costs.

All concur.

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

ENTERED: APRIL 22, 2010



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