SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 21, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Andrias, Nardelli, McGuire, Abdus-Salaam, JJ.

3399 The People of the State of New York, Respondent, Ind. 1768/05

-against-

Francisco Velasquez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Jared Wolkowitz of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, J.), rendered February 26, 2008, convicting defendant, after a nonjury trial, of attempted rape in the first degree, attempted criminal sexual act in the second degree, attempted disseminating indecent material to minors in the first degree (two counts) and attempted endangering the welfare of a child, and sentencing him to an aggregate term of 5 years, unanimously affirmed.

Defendant did not preserve his argument that he established the affirmative defense of entrapment as a matter of law, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

Furthermore, in the exercise of our factual review power, we find that the court's verdict rejecting that defense was not against the weight of the evidence. The police actions, both on the Internet and at the scene of the crime, merely provided defendant with the opportunity to commit sexual crimes against a person he believed to be a 12-year-old girl (*see People v Brown*, 82 NY2d 869, 871-872 [1993]), and none of these actions can be viewed as "active inducement or encouragement" (Penal Law § 40.05). Moreover, there was significant evidence of defendant's predisposition to commit the crimes charged.

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

ENTERED: OCTOBER 21, 2010

CLERK

Gonzalez, P.J., Andrias, Nardelli, McGuire, Abdus-Salaam, JJ.

3400 Joey Acosta-Rodriguez, etc., et al., Index 22072/01
Plaintiffs-Appellants, 20295/03

-against-

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

Tara McDermott,
Defendant.
- - - - -
Marilyn Arce, etc.,
Plaintiff-Appellant,

-against-

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

_____

Arnold DiJoseph, New York, for appellants.

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

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about January 6, 2009, which granted defendants-respondents' motion for, inter alia, summary judgment dismissing the complaints as against them, unanimously affirmed, without costs.

Plaintiffs raised no triable issues of fact to contradict the evidence submitted by defendants that the sexual abuse of the infant plaintiffs by an employee of defendant Board of Education (BOE) was not committed in furtherance of school business and was

done for personal reasons. Accordingly, defendants cannot be held liable under the theory of respondeat superior (*see N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 251-252 [2002]; *Taylor v United Parcel Serv., Inc.*, 72 AD3d 573 [2010], *lv denied* __ NY3d __, 2010 NY Slip Op 80967 [2010]; *Osvaldo D. v Rector Church Wardens & Vestrymen of Parish of Trinity Church of N.Y.*, 38 AD3d 480 [2007]).

The record also presents no triable issues regarding whether the employee was negligently hired, supervised or retained. Plaintiffs failed to raise a factual issue as to whether, at the time of the employee's hiring, BOE was on notice of facts triggering a duty to inquire further, or to contradict BOE's claim that it conducted its standard pre-employment investigation of the employee (*compare T.W. v City of New York*, 286 AD3d 243, 245 [2001]). Nor did plaintiffs present evidence indicating that defendants were on notice, either actual or constructive, of the employee's propensity for sexual abuse of minors (*see White v Hampton Mgt. Co., L.L.C.*, 35 AD3d 243 [2006]; *Gomez v City of New York*, 304 AD2d 374 [2003]; *compare G.G. v Yonkers Gen. Hosp.*, 50 AD3d 472 [2008]). Knowledge that the employee bought pizza for students and observed them at play does not constitute notice of the employee's proclivity for sexual abuse (*compare Doe v Whitney*, 8 AD3d 610 [2004]).

Furthermore, the subject incident occurred off school

grounds and there is nothing in the record indicating that BOE released the infant plaintiffs to the employee or even knew that the three were together. Thus, there are no triable issues as to whether plaintiff's injuries were caused by a failure of adequate supervision or a disregard on premises that should have alerted defendants to a hazardous situation (*see J.E. v Beth Israel Hosp.*, 295 AD2d 281 [2002], *lv denied* 99 NY2d 507 [2003]).

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

ENTERED: OCTOBER 21, 2010

CLERK

Gonzalez, P.J., Andrias, Nardelli, McGuire, Abdus-Salaam, JJ.

3401 In re Erica D.,

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

Maria D.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

George E. Reed, Jr., White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for respondent.

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

_____

Order of fact-finding and disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about March 13, 2009, which found that respondent mother neglected the subject child, and placed the child with the Commissioner of Social Services pending the completion of the next scheduled permanency hearing, unanimously affirmed with respect to the finding of neglect, and the appeal otherwise dismissed as moot, without costs.

Although the agency failed to meet its burden of showing educational neglect by a preponderance of the evidence, the record supports the alternative theory of neglect advanced by the agency of inadequate guardianship and supervision (*see Matter of Satori R.*, 202 AD2d 432, 433 [1994]). The evidence shows that

the child has Down's Syndrome with autistic features, requiring constant care, while the mother herself has a full-scale IQ of around 50. Although a parent's mental retardation will not support a finding of neglect per se (*see Matter of Trina Marie H.*, 48 NY2d 742, 743 [1979]), a preponderance of the evidence here demonstrates that, given her daughter's intense needs and her own limitations, the mother was unable to provide adequate care for her daughter, thus creating an imminent risk of harm to the child (*see Matter of Lashina P.*, 52 AD3d 293, 294 [2008]; *Matter of Anna X.*, 148 AD2d 890 [1989], *lv denied* 74 NY2d 608 [1989]).

The mother's appeal from the dispositional order is rendered moot by the subsequent entry of an order continuing placement, as well as the subsequent termination of her parental rights (*see Matter of Breeyanna S.*, 45 AD3d 498 [2007], *lv denied* 10 NY3d 706 [2008]).

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

ENTERED: OCTOBER 21, 2010

CLERK

Gonzalez, P.J., Andrias, Nardelli, McGuire, Abdus-Salaam, JJ.

3403 In re City Services, Inc., et al., Index 117090/09
Petitioners-Appellants,

-against-

Richard H. Neiman, Superintendent
of Banks, et al.,
Respondents-Respondents.

_____

Bond, Schoeneck & King, PLLC, Albany (Hermes Fernandez of counsel), for appellants.

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

_____

Judgment, Supreme Court, New York County (Carol R. Edmead, J.), entered March 17, 2010, dismissing this proceeding to annul respondent's determination that denied an application for a commercial check-cashing license, unanimously affirmed, without costs.

In 2004, the New York Legislature enacted amendments to Article 9-A of the Banking Law to clarify that commercial and personal check cashers were subject to the licensing requirement of Banking Law § 367 (L 2004, ch 432, § 1; *see* Assembly Memorandum in Support, 2 McKinney's 2004 Session Laws 1923). The statute provided that existing commercial check cashers, such as petitioner City Services, could continue operating pursuant to temporary licenses, which could be extended while their applications for a permanent license were pending.

Petitioners submitted an application disclosing that the two shareholders and officers of City Services had been convicted in 1995 of a federal felony involving the failure to file a currency transaction report in violation of the Bank Secrecy Act (31 USC § 5313[a]). Respondent's initial determination to deny the application from City Services was proper under Banking Law § 369(6), which bars issuance of a check-cashing license if the applicant, or any of its officers or substantial shareholders, "has been convicted of a felony in any jurisdiction or of a crime which, if committed within this state, would constitute a felony under the laws thereof," and has not been pardoned or been given a certificate of relief from disabilities or of good conduct pursuant to Article 23 of the Correction Law.

Upon learning that one of City Services' two principals had received a certificate of relief from disabilities and that the convictions arose from a 1986 transaction, respondent agreed to hold the determination in abeyance and review the application. Based on review and examination of City Services' current operations, as well as his finding that the prior convictions were directly related to the license sought, respondent determined that petitioners failed to meet the character and fitness requirements under § 369(1) for issuance of a license. Respondent relied on its examiner's conclusion, following an audit, that petitioners were operating the business in an unsafe

and unsound condition, that they had refused requests to provide records critical to the examination, had steadfastly failed to cooperate, lacked candor, and were in violation of applicable regulations.

Judicial review of an administrative determination pursuant to CPLR article 78 is limited to inquiry into whether the agency acted arbitrarily or capriciously (*J.W.J. Check Cashing Corp.*, 91 AD2d 1034 [1983]). While petitioners dispute respondent's findings, the Court may not substitute its own judgment for that of the agency, particularly with respect to matters within its expertise (*Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 363 [1987]).

The contention that the Banking Department improperly discriminated against petitioners based on the prior convictions of its principals is without merit. Since one of those principals never obtained a pardon or certificate pursuant to Article 23 of the Correction Law, the antidiscrimination provisions of Article 23-A of that law are inapplicable and the company is ineligible for a check-cashing license (Banking Law 369[6]; Correction Law § 751; *Matter of McComb v Division of Licensing Servs.*, 175 AD2d 670 [1991]). Alternatively, respondent's determination was based on a rational conclusion that the prior convictions of the two principals are directly related to the license sought, so as to permit this type of

discrimination (Correction Law § 752[1]; *Matter of Schmidt & Sons v New York State Liq. Auth.*, 52 NY2d 751 [1980]). We are not persuaded that respondent failed to expressly consider all the statutory factors in Correction Law § 753. In any event, respondent did properly rely on the independent evidence of petitioners' current unsatisfactory operations to conclude that they lacked the good character required for licensure and had not been rehabilitated (*see Matter of Bonacorsa v Van Lindt*, 71 NY2d 605 [1988]).

Since the Banking Law gives the Superintendent discretion to grant or deny the license, he had the authority to determine that petitioners "had no property interest in licensure or a due process right to a hearing in connection therewith" (*Matter of DeCostole Carting v Business Integrity Commn. of City of N.Y.*, 2 AD3d 225 [2003]; *see also Matter of Daxor Corp. v State of N.Y. Dept. of Health*, 90 NY2d 89, 98-99 [1997]). Neither their prior operation of the business nor the Department's renewal of their temporary license gave rise to a protectable property interest requiring a hearing or procedures for review of the application (*see Matter of Solomon v Department of Bldgs. of City of N.Y.*, 46 AD3d 370, 371-372 [2007]). Petitioners' further contention that they were subject to more exacting scrutiny than other license applicants, in violation of their equal protection rights, is without merit since they do not claim to be members of a suspect

class, and the Department audited all licensees and articulated a rational basis, related to a legitimate government interest, for subjecting petitioners to a full audit (*see Matter of Walton v New York State Dept. of Correctional Servs.*, 13 NY3d 475, 493-494 [2009]).

Petitioners were not entitled to a hearing in connection with the proceeding (CPLR 7804[h]), since review is limited to the administrative record, and they failed to identify any issues that would require a hearing (*see Matter of Guldal v Inta-Boro Two-Way Assn., Inc.*, 74 AD3d 1198 [2010]; *Matter of Bradford v New York City Dept. of Correction*, 56 AD3d 290, 291 [2008], *lv denied* 12 NY3d 711 [2009]).

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

ENTERED: OCTOBER 21, 2010

CLERK

Gonzalez, P.J., Andrias, Nardelli, McGuire, Abdus-Salaam, JJ.

3404 The People of the State of New York, Docket 893C/07
Respondent,

-against-

Donnie Williams,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Brian J. Reimels of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Seth L. Marvin, J.), rendered April 29, 2009, convicting defendant, after a jury trial, of resisting arrest and disorderly conduct, and sentencing him to concurrent terms of 6 months and 5 days, respectively, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence for the resisting arrest conviction to a term of 60 days of intermittent imprisonment to be served on weekends, and reducing the sentence for the disorderly conduct conviction to time served, and otherwise affirmed. The matter is remitted to Supreme Court, Bronx County, for further proceedings pursuant to CPL 460.50(5) and for specifying the dates of incarceration pursuant to Penal Law § 85.00(iv).

The verdict was based on legally sufficient evidence and was

not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations, including its resolution of conflicts in testimony.

The court properly denied defendant's challenge for cause, since the prospective juror's responses provided a sufficient assurance of impartiality. Defendant's prosecutorial misconduct claims are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find that while some of the prosecutor's rhetoric was inappropriate, it did not deprive defendant of a fair trial. Defendant's remaining contentions are unavailing (*see People v Correa*, 15 NY3d 213 [2010]).

We find the sentence excessive to the extent indicated.

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

ENTERED: OCTOBER 21, 2010

CLERK

Gonzalez, P.J., Andrias, Nardelli, McGuire, Abdus-Salaam, JJ.

3405 The People of the State of New York, Ind. 344/07
Respondent,

-against-

George Hayes, also known as James Larkin,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered on or about November 14, 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 21, 2010

CLERK

Gonzalez, P.J., Andrias, Nardelli, McGuire, Abdus-Salaam, JJ.

3407 The People of the State of New York, Docket 33214C/03
Respondent,

-against-

Jose Reyes,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Bari L. Kamlet of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Harold Enten, J.H.O. at hearing; Ralph Fabrizio, J. at nonjury trial and sentence), rendered June 27, 2005, convicting defendant of attempted criminal possession of a weapon in the fourth degree and attempted possession of ammunition, and sentencing him to a term of 1 year's probation and a conditional discharge, unanimously reversed, on the law, defendant's motion to suppress statements and physical evidence granted, and the information dismissed.

Defendant's statements admitting that he had a pistol in his apartment and informing the detectives of its location were the product of custodial questioning that should have been preceded by *Miranda* warnings. Detectives who had anonymous information that defendant had a pistol in his apartment, and also that he had an outstanding warrant for failing to respond to a summons,

went to defendant's apartment and entered with his consent. Since the detectives told defendant they had a warrant for his arrest, a reasonable person in his position would not believe he was free to leave (*see People Yukl*, 25 NY2d 585 [1969], *cert denied* 400 US 851 [1970]). The inquiry as to whether he had a weapon was likely to elicit an incriminating response, and it did not constitute a threshold, clarifying or exigent inquiry under the circumstances (*compare People v Huffman*, 41 NY2d 29 [1976]). As the People concede that the pistol and ammunition also should be suppressed in the event we conclude the statement should be suppressed, the motion is granted in its entirety.

In view of this determination, we find it unnecessary to reach any other issues.

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

ENTERED: OCTOBER 21, 2010

CLERK

Gonzalez, P.J., Andrias, Nardelli, McGuire, Abdus-Salaam, JJ.

3408 The People of the State of New York, Ind. 2524/03
M-4607 Respondent,

-against-

William Escalera,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Nicole Coviello of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, New York County (Rena K. Uviller, J.), rendered October 20, 2008, resentencing defendant to a term of 7 years with 5 five years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was not barred by double jeopardy, since defendant was still serving his prison term at that time, and therefore had no reasonable expectation of finality in his illegal sentence (*see People v Murrell*, 73 AD3d 598 [2010]). We have considered and rejected defendant's due process argument. Defendant's

remaining claims are similar to arguments that were rejected in *People v Williams* (14 NY3d 198 [2010]).

M-4607 *People v William Escalera*

Motion seeking coram nobis relief denied.

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

ENTERED: OCTOBER 21, 2010

CLERK

Gonzalez, P.J., Andrias, Nardelli, McGuire, Abdus-Salaam, JJ.

3410 The People of the State of New York, Docket 39C/05
Respondent,

-against-

Adams Jawara,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Marc A. Sherman of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Denis J. Boyle, J.), rendered June 16, 2006, convicting defendant, after a nonjury trial, of attempted criminal contempt in the second degree and two counts of harassment in the second degree, and sentencing him to an aggregate term of 1 year's probation and a conditional discharge, unanimously affirmed.

The verdict was based upon legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-49 [2007]). There is no basis for

disturbing the court's decision to credit the complainant's testimony and reject that of defendant.

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

ENTERED: OCTOBER 21, 2010

CLERK

Gonzalez, P.J., Andrias, Nardelli, McGuire, Abdus-Salaam, JJ.

3411 The People of the State of New York, Ind. 1085/08
Respondent,

-against-

Jahmeeka Joseph,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Robert R. Sandusky, III of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Ethan Greenberg, J.), rendered January 15, 2009, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him to a term of 5 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 credibility determinations, including its evaluation of the victim's conflicting statements. The victim's testimony that defendant took part in the robbery was corroborated by the testimony of two officers who came upon

the robbery while it was in progress, and the inconsistencies in their testimony that defendant relies on were insignificant.

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

ENTERED: OCTOBER 21, 2010

CLERK

Gonzalez, P.J., Andrias, Nardelli, McGuire, Abdus-Salaam, JJ.

3412	The People of the State of New York, Respondent, -against-	Docket 93244C/06 33791/06 32442C/06 33793C/06

Mercedes Ovalles,
Defendant-Appellant.

_____

Getz & Braverman, Bronx (Michael I. Braverman of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Marc A. Sherman of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Joseph Fisch, J.), rendered October 11, 2007, convicting defendant, after a nonjury trial, of attempted assault in the third degree and sentencing her to a term of 30 days of intermittent imprisonment, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to a conditional discharge, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: OCTOBER 21, 2010

CLERK

Gonzalez, P.J., Andrias, Nardelli, McGuire, Abdus-Salaam, JJ.

3415 The People of the State of New York, Ind. 453/09
Respondent,

-against-

Robert Forrest,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Timothy Stone of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Herbert Adlerberg, J.H.O. at hearing; John Cataldo, J. at plea; Thomas Farber, J. at sentence), rendered August 25, 2009, convicting defendant of criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to a term of 7 years, unanimously reversed, on the law and the facts, defendant's suppression motion granted, and the indictment dismissed.

It is well settled that a frisk is permissible only if the police possess a particularized reasonable suspicion that the suspect "is armed and may be dangerous" (*People v Russ*, 61 NY2d 693, 695 [1984]). Although he did not see a transaction, an officer observed signs of drug trafficking in an area known for such activity that provided a founded suspicion that defendant

had bought drugs in a supermarket. After receiving a radio communication from the observing officer, the arresting officer asked defendant where he was coming from. Although the officer concluded that the answer defendant gave was a lie, its truth or falsity was not apparent. Neither defendant's answer nor his silence when the officer asked him whether he was armed provided a sufficient predicate for a frisk (*see People v Banks*, 85 NY2d 558, 562 [1995]; *People v Gonzalez*, 295 AD2d 183 [2002]). Accordingly, the suppression motion is granted.

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

ENTERED: OCTOBER 21, 2010

CLERK

Gonzalez, P.J., Andrias, Nardelli, McGuire, Abdus-Salaam, JJ.

3416 The People of the State of New York, Ind. 2765/07
M-4317 Respondent,

-against-

Jennifer Wilkov,
Defendant-Appellant.

_____

Law Office of Jacob R. Evseroff, P.C., Brooklyn (Jacob R. Evseroff of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Deborah L. Morse of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered June 4, 2008, convicting defendant, upon her plea of guilty, of scheme to defraud in the first degree, violation of General Business Law § 352-c(5) and 22 counts of violation of General Business Law § 352-c(6), and sentencing her to an aggregate term of 6 months, with 5 years' probation and restitution in the amount of $41,336.14, 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]). Contrary to defendant's argument, the court did not decide her motion until after it accorded her a full opportunity to be heard. The record

establishes that the plea was voluntary, and that defendant's assertions of innocence, coercion and ineffective assistance of counsel were contradicted by the thorough plea colloquy.

The court properly exercised its discretion in denying defendant's alternative request for an adjournment for the purpose of retaining new counsel. There had been a lengthy period between the plea and sentencing proceedings in which this nonindigent defendant could have hired a new attorney if she wished, and, in any event, "no purpose would be served by such a substitution, given the patently meritless nature of defendant's plea withdrawal application" (*People v Rivera*, 34 AD3d 240, 241 [2006], *lv denied* 8 NY3d 926 [2007]).

Defendant's CPL 440.10 motion to vacate judgment is not before this Court because leave to appeal was denied (*see* CPL 450.15[1], 460.15; *People v Rivera*, 35 AD3d 304, 305 [2006], *lv denied* 8 NY3d 949 [2007]). Defendant's request that the bench for this appeal entertain a leave application is procedurally improper because CPL 460.15 specifically provides that such an application can only be made to an individual justice, and can only be made once.

Defendant's remaining argument is improperly raised for the first time in a reply brief.

M-4317 - *People v Jennifer Wilkov*

Motion to strike a portion of reply brief granted.

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

ENTERED: OCTOBER 21, 2010

CLERK

Gonzalez, P.J., Andrias, Nardelli, McGuire, Abdus-Salaam, JJ.

3417N Juan Ruiz, et al., Index 106394/08
Plaintiffs, 590172/09

-against-

Frog Co., LLC, et al.,
Defendants.
- - - - - -
McGovern & Company, LLC,
Third-Party Plaintiff,

-against-

Midtown Contracting Corporation,
Third-Party Defendant,

Aldo's Iron Works, Incorporated,
Third-Party Defendant-Appellant.
- - - - - -
Barry McTiernan & Moore,
Nonparty-Respondent.

_____

Flynn, Gibbons & Dowd, New York (Ann Teresa McIntyre of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered January 29, 2010, which granted the motion of nonparty law firm Barry McTiernan & Moore (BMM) for leave to withdraw as counsel for third-party defendant Aldo's Iron Works, Inc. (Aldo's), unanimously affirmed, without costs.

Aldo's was plaintiff's employer when plaintiff sustained injuries at his workplace. Aldo's liability carrier, National

Contractors Insurance Company, Inc. (NCIC), provided coverage under the policy up to $6,000 per occurrence and advised Aldo's that it would no longer pay to defend the claim or indemnify it in the case of liability since the $6,000 limit had been reached.

Although a motion for withdrawal by counsel is an improper vehicle to test the disclaimer of coverage by the insurer (*see e.g. Sojka v 43 Wooster LLC*, 19 AD3d 266, 267 [2005]), NCIC did not disclaim coverage (*see Dillon v Otis El. Co.*, 22 AD3d 1 [2005]). Rather, the contractually agreed-to limitation on defense costs was exhausted and under these circumstances, BMM should not be compelled to continue representation without compensation (*see Cullen v Olins Leasing*, 91 AD2d 537 [1982], *appeal dismissed* 61 NY2d 867 [1984]).

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

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

ENTERED: OCTOBER 21, 2010

CLERK

Saxe, J.P., Catterson, Renwick, Richter, Abdus-Salaam, JJ.

2821 In re City of New York, Index 404661/06
Petitioner-Appellant,

-against-

Antonia C. Novello, as Commissioner of the
New York State Department of Health, et al.,
Respondents-Respondents.

_____

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for appellant.

Andrew M. Cuomo, Attorney General, New York (Sudarsana Srinivasan of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Debra A. James, J.), entered January 9, 2008, dismissing this article 78 proceeding challenging respondents' authority to include in the State's calculation of the City's base-year medical assistance expenditures under the Local Share Cap a prorated portion of the amount by which the City failed to meet its home care savings target, unanimously affirmed, without costs.

In 2005, the State enacted the "Local Share Cap," which places a maximum limit on the amount each local social services district has to pay in Medicaid expenses in a given year, with the excess to be borne by the State (L 2005, ch 58, Pt C, § 1[b]). Under this enactment, the State must calculate base year expenditures "based on actual expenditures made by or on behalf of social services districts" during the base year of

2005.

The prior law, which expired on March 31, 2006, provided for a target method to compel local districts to reduce the cost of home health care primarily funded by the State (L 2004, ch 58, Pt C, § 8). Under the Home Care Savings Target law, if a local district failed to meet the savings target, the State was empowered to "intercept" home health care service payments and other payments to the district in an amount "sufficient to reimburse the state for [the amount the district exceeded] the savings target" (*id.*, extending what was first enacted as L 1997, ch 433, § 36[6]).

In the instant case, on June 27, 2006, the Department of Health informed the City that unlike in the past, where a district's home care expenditures in excess of its target had resulted in an interception of the lost savings amount during a weekly Medicaid local share payment, with respect to the fiscal year 2005-06 the City's lost savings would not be intercepted, but rather included in the 2005 base-year calculation to develop the City's Local Share Cap.

The City brought this article 78 proceeding challenging the Department of Health's inclusion of the 2005-06 unmet home care savings as an expenditure in its calculation of the City's base-year expenditures for purposes of the Local Share Cap, arguing that this exceeded its authority under the relevant legislation.

It is not apparent from the plain language of the legislation cited above whether the Medicaid expenditures made due to the City's failure to achieve any home care savings toward its target amounts were "actual expenditures made on behalf of the City" that could properly be counted toward the base year under the Local Share Cap. Indeed, the statutes in question are so opaque as to provide support for either party's position. Nevertheless, where an agency's determination is based on a detailed methodology derived from a legislative enactment, deference to that agency is warranted where the determination had a rational basis in the record, and was neither arbitrary and capricious nor affected by an error of law (*see Matter of Schlossberg v Wing*, 277 AD2d 41 [2000]). An accurate interpretation of the legislative intent in this respect could best be ascertained by relying on the Department of Health's special "knowledge and understanding of underlying operational practices" (*Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 [1980]) in determining what constitutes expenditures made on behalf of a district.

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

ENTERED: OCTOBER 21, 2010

CLERK

Andrias, J.P., Saxe, McGuire, Moskowitz, Freedman, JJ.

2864 Bruce Ovitz, etc., Index 603692/08
Plaintiff-Respondent,

-against-

Bloomberg L.P., et al.,
Defendants-Appellants.

_____

Willkie Farr & Gallagher LLP, New York (Thomas H. Golden of counsel), for appellants.

Sperling & Slater, P.C., Chicago, IL (Greg Shinall, of the Illinois Bar, admitted pro hac vice, of counsel), for respondent.

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Order, Supreme Court, New York County (Judith J. Gische, J.), entered October 7, 2009, which, to the extent appealed from, denied so much of defendants' motion to dismiss the first, fifth and sixth causes of action, unanimously reversed, on the law, without costs, the motion granted in its entirety, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

In this putative class action, accepting as true the facts alleged in the complaint (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), we hold the automatic renewal provision of the agreement between plaintiff and defendants was both "inoperative" (General Obligations Law § 5-901) and "unenforceable" (§ 5-903), since defendants failed to provide the requisite notice to plaintiff that the two-year subscription term was to be automatically

renewed (*see Guerrero v West 23rd St. Realty, LLC*, 45 AD3d 403 [2007], *lv denied* 10 NY3d 707 [2008]; *Protection Indus. Corp. v DDB Needham Worldwide*, 306 AD2d 175 [2003]). As such, the agreement was never effectively renewed for a definite term and could have been canceled by plaintiff at any time (*see Concourse Nursing Home v Axiom Funding Group*, 279 AD2d 271 [2001]).

However, dismissal of the claims based on §§ 5-901 and 5-903 is warranted since plaintiff makes no allegations that he paid for services he did not receive (*see Ludl Elecs. Prods. v Wells Fargo Fin. Leasing*, 6 AD3d 397, 398 [2004], *lv denied* 3 NY3d 603 [2004]; *Concourse Nursing Home v Axiom Funding Group*, 279 AD2d 271, *supra* [although subject equipment leases were never renewed because lessor failed to comply with General Obligations Law § 5-901, lessee, who continued using the equipment after the leases terminated, was not entitled to recover rent for post-termination period]). To the extent plaintiff seeks damages for defendants' alleged breach of these statutes, a private right of action is not expressly created by the language of the statutes and a legislative intent to create such a right of action is not fairly implied in the statutory provisions and their legislative history (*see e.g. Brian Hoxie's Painting Co. v Cato-Meridian Cent. School Dist.*, 76 NY2d 207, 211 [1990]).

The complaint also fails to state a cause of action under General Business Law § 349. Plaintiff, a resident of Illinois,

was not deceived in New York State (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 325 [2002]). Nor did plaintiff allege actual injury resulting from the alleged deceptive practices, since defendants did not commence enforcement proceedings against plaintiff and are not seeking to collect fees or payments from plaintiff in connection with the cancellation of his subscription (*see Han v Hertz Corp.*, 12 AD3d 195 [2004]).

Furthermore, declaratory and injunctive relief is unwarranted in this case, since no justiciable controversy remains to support the claim for declaratory relief (*see Spitzer v Schussel*, 48 AD3d 233, 234 [2008]).

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

ENTERED: OCTOBER 21, 2010

CLERK

Tom, J.P., Andrias, Catterson, Moskowitz, Acosta, JJ.

3009 Yahaira Hernandez, et al., Index 104989/07
Plaintiffs,

-against-

Dr. Arden Kaisman,
Defendant.
- - - - - -
Dr. Arden Kaisman,
Third-Party Plaintiff-Appellant,

-against-

Dr. Paul Brisson,
Third-Party Defendant-Respondent.

_____

Sidney M. Segall, Port Washington, for appellant.

Kayser & Redfern, LLP, New York (Scot Maslin and Declan P. Redfern of counsel), for respondent.

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Order, Supreme Court, New York County (Debra A. James, J.), entered October 2, 2009, which, in an action alleging sexual harassment, granted third-party defendant Brisson's motion for summary judgment dismissing third-party plaintiff Kaisman's claim for contribution, unanimously affirmed, with costs.

Kaisman and Brisson were co-owners of a company that managed their medical practices. The main action involves allegations that Kaisman sexually harassed each of the three plaintiffs. No allegations of sexual harassment were made by any of the plaintiffs against Brisson. Kaisman brought a third-party complaint that, to the extent at issue here, seeks contribution

from Brisson on the theory that Brisson committed acts that were part and parcel of the injuries allegedly suffered by the plaintiffs.

We are not presented with a circumstance where the limited allegations that Kaisman made against Brisson (beyond statements of a conclusory nature) were acknowledged by the plaintiffs to have occurred, where no evidence from the plaintiffs regarding the Kaisman allegations was adduced one way or another, or where the plaintiffs differed among themselves in their evidence regarding the Kaisman allegations. On the contrary, all of the plaintiffs have concurred with Brisson's denial of Kaisman's allegations. Moreover, Kaisman did not put forward any evidence that the alleged conduct by Brisson represented conduct that was "unwelcome" to the plaintiffs - even if, implausibly under the particular facts of this case, that conduct did occur contrary to the denials of the plaintiffs. In short, a jury would have no basis to conclude that Brisson engaged in *actionable* conduct against these plaintiffs.[1]

In view of the foregoing, the decision below granting summary judgment to Brisson must be affirmed. As the factual posture of this case is not one where a jury could find that

[1] The fact that some employees do not find conduct "unwelcome" does not, of course, prevent any other employee who was the target of, or who was exposed to such conduct, from complaining about such conduct.

Brisson was a second tortfeasor, we need not decide the broader question of the parameters of the contribution doctrine under the New York State and New York City Human Rights Laws, including the extent to which acts of harassment alleged beyond those in the main complaint represent the same injury for which contribution could be sought (or rather additional distinct injuries for which contribution could not be sought), and whether the differences in the substantive standards for establishing sexual harassment under the two laws would require different results in respect to contribution.

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

ENTERED: OCTOBER 21, 2010

CLERK

Sweeny, J.P., Freedman, Richter, Manzanet-Daniels, Román, JJ.

3418 The People of the State of New York, Respondent, Ind. 5508/03

-against-

Marvin Hill, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Brenda Soloff, J. at plea; Renee A. White, J. at sentence), rendered February 3, 2009, convicting defendant of criminal possession of a controlled substance in the fifth and seventh degrees, and sentencing him to an aggregate term of 2⅓ to 7 years, unanimously reversed, as a matter of discretion in the interest of justice, and the matter remanded to Supreme Court for further proceedings in accordance with this decision.

Defendant's plea agreement provided that the felony conviction would be vacated if he successfully completed a drug program. In the circumstances of this case, defendant's challenge to the basis for the program's decision to terminate him gave rise to a factual dispute that required the court to conduct an inquiry of sufficient depth to satisfy itself that

there was a legitimate basis for the program's decision (*see People v Fiammegta*, 14 NY3d 90 [2010]). The court, which relied entirely on factual claims in the probation report that defendant expressly challenged, did not conduct any type of factual inquiry or explain its findings. Although defendant did not ask for any further inquiry and thus did not preserve this issue, we choose to review it in the interest of justice.

As the People concede, defendant is entitled to a new sentencing proceeding in any event, because the court misapprehended its sentencing discretion.

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

ENTERED: OCTOBER 21, 2010

CLERK

Sweeny, J.P., Freedman, Richter, Manzanet-Daniels, Román, JJ.

3419 Response Personnel, Inc., Index 106509/08
Plaintiff-Appellant,

-against-

Erik Aschenbrenner, etc., et al.,
Defendants-Respondents.

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A. Bernard Frechtman, New York (Harvey L. Woll of counsel), for appellant.

Kaplan Belsky Ross Bartell, L.L.P., Garden City (Lewis A. Bartell of counsel), for respondents.

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Resettled order, Supreme Court, New York County (Eileen Bransten, J.), entered January 6, 2010, which, to the extent appealed from, denied plaintiff's motion for a protective order denying defendants' request for the production of tax returns and other documents and directed plaintiff to produce, at its own expense, the requested discovery in the form of electronic documents, unanimously modified, on the law, to delete the direction to plaintiff to fund the discovery at its own expense, and otherwise affirmed, without costs.

The court properly denied plaintiff's motion for a protective order, since plaintiff failed to show that there was anything unreasonable or improper about defendants' demands for its tax returns (*see Pyfrom v Tishman Constr. Co. of N.Y.*, 270 AD2d 24 [2000]; *Gitlin v Chirinkin*, 71 AD3d 728 [2010]).

Under these circumstances, directing plaintiff to produce documents in electronic form may be an appropriate response to defendants' argument that they have insufficient office space in which to review voluminous papers, but requiring plaintiff to bear the cost of the production imposes an undue burden on it, since, generally, the cost of production is borne by the party requesting the production, and the cost of creating electronic documents here would not have been inconsequential (*see Waltzer v Tradescape & Co., L.L.C.*, 31 AD3d 302, 304 [2006]).

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

ENTERED: OCTOBER 21, 2010

CLERK

Sweeny, J.P., Freedman, Richter, Manzanet-Daniels, Román, JJ.

3422 The People of the State of New York Ind. 5964/05
Respondent,

-against-

Toni Branham Matthews, etc.,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Sylvia Wertheimer of counsel), for respondent.

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Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered September 20, 2006, convicting defendant, upon her plea of guilty, of grand larceny in the second degree, and sentencing her to a term of 1⅓ to 4 years, with restitution in the amount of $80,154.28, unanimously affirmed.

Since defendant obtained a promise of probation by misrepresenting her ability to pay restitution, the court properly revoked that promise and imposed a prison term, notwithstanding defendant's partial payment. In any event, on appeal defendant seeks no remedy other than a sentence reduction. Since she has completed the prison and parole components of her

sentence, the only remaining provision is restitution, and we decline to reduce the amount ordered.

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

ENTERED: OCTOBER 21, 2010

CLERK

Sweeny, J.P., Freedman, Richter, Manzanet-Daniels, Román, JJ.

3423 The People of the State of New York, Respondent, Ind. 45340C/04

-against-

Adrion Wentworth, Defendant-Appellant.

_____

Susanna De La Pava, New York, for appellant.

Robert T. Johnson, District Attorney, Bronx (Marc Adam Sherman of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Nicholas J. Iacovetta, J. at speedy trial motion; Joseph J. Dawson, J. at nonjury trial and sentence), rendered February 1, 2007, as amended September 25, 2007, convicting defendant of operating a motor vehicle while under the influence of alcohol, and sentencing him to time served, unanimously affirmed.

The court properly denied defendant's constitutional speedy trial motion (*see People v Taranovich*, 37 NY2d 442 [1975]). Although the pretrial delay was unusually lengthy for an intoxicated driving case, only a small fraction of the delay was attributable to the People, and defendant's argument to the

contrary is without merit. The record also fails to support defendant's claims of prejudice.

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

ENTERED: OCTOBER 21, 2010

CLERK

Sweeny, J.P., Freedman, Richter, Manzanet-Daniels, Román, JJ.

3424 Keith Hughey, et al., Index 115793/04
Plaintiffs, 590046/06
591098/06
-against- 590355/06
591127/06

RHM-88, LLC, et al.,
Defendants,

Pritchard Industries, Inc.,
Defendant-Respondent-Appellant,

One United Nations Plaza Condominium,
Defendant-Appellant-Respondent.
- - - - - - - -
[And a Third-Party Action]
- - - - - - - -
One United Nations Plaza Condominium,
Second Third-Party Plaintiff-
Appellant-Respondent,

-against-

Cushman & Wakefield, Inc.,
Second Third-Party Defendant-
Respondent-Appellant.

[And Other Actions]

_____

Litchfield Cavo, LLP, New York (Joseph E. Boury of counsel), for One United Nations Plaza Condominium, appellant-respondent/appellant-respondent.

Russo, Keane & Toner, LLP, New York (Thomas F. Keane of counsel), for Pritchard Industries, Inc., respondent-appellant.

Mischel & Horn, P.C., New York (Naomi M. Taub of counsel), for Cushman & Wakefield, Inc., for respondent-appellant.

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Order, Supreme Court, New York County (Doris Ling-Cohan,

J.), entered April 15, 2009, which, to the extent appealed from, denied the motion of defendant One United Nations Plaza Condominium (UNPC) to dismiss the complaint for plaintiffs' failure to serve a notice of claim; granted defendant Pritchard's motion for summary judgment dismissing plaintiffs' claims against it; qualified the conditional order of contractual indemnification in favor of UNPC as against second third-party defendant Cushman & Wakefield (C&W); conditionally granted contractual indemnification in favor of UNPC and C&W against Pritchard; and conditionally awarded contractual indemnification in favor of Pritchard and UNPC against C&W, unanimously modified, on the law, the conditional award in Pritchard's favor against C&W vacated, and otherwise affirmed, without costs.

The court correctly held that plaintiffs were not required to file a notice of claim prior to suing UNPC. Unlike defendant United Nations Development Corporation (UNDC), UNPC is not a public benefit corporation entitled to notice under General Municipal Law § 50-i(1). UNPC offers no support for its novel argument that it is the alter ego of the City.

Nor is there any merit to UNPC's alternative arguments: (1) that plaintiffs' complaint against it should have been dismissed because it delegated full responsibility for the two forces that allegedly caused this injury -- maintenance and repair of the canopy and gutter, and removal of snow and ice from the sidewalks

-- to C&W and Pritchard, respectively, thus precluding a charge of constructive notice of any allegedly dangerous condition created as a result of these other entities' failures to fulfill the requirements of their contracts; (2) that in any event, it is the UNPC Board, not UNPC, that has control over and responsibility for the common areas. UNPC and its Board are one and the same for purposes of this lawsuit. Moreover, an issue of fact exists as to whether UNPC had constructive notice of the recurring ice formation as a result of the leaky gutter, inasmuch as the Millennium Hotel and UNDC, which are closely intertwined and employ high-level personnel in common with UNPC, were both named as defendants in another case in which the plaintiff there claimed to have been injured in the same manner and in the same location as plaintiffs herein. In any event, UNPC can be held liable to plaintiffs as C&W's principal for any negligence committed by C&W, even if UNPC were not itself actively and directly negligent. Moreover UNPC, as a landowner, may not delegate its duty to keep its premises in a safe condition with regard to third parties. Rather, its recourse is to secure an indemnification agreement from the party to whom it delegates specific responsibilities, and "allocate the risk of liability to third parties by the procurement of liability insurance for their

mutual benefit" (*Morel v City of New York*, 192 AD2d 428, 429 [1993]).

The court also properly dismissed plaintiffs' claims against Pritchard, correctly holding that Pritchard owed no duty to the injured plaintiff because the Cleaning Services Agreement was between Pritchard and UNPC, and the injured person was neither a party to, nor an intended third-party beneficiary of, that contract (*see Eaves Brooks Costume Co. v Y.B.H. Realty Corp.*, 76 NY2d 220, 226 [1990]). Nor do any of the exceptions set forth in *Espinal v Melville Snow Contrs.* (98 NY2d 136 [2002]) apply to justify imposing tort liability against Pritchard in favor of plaintiffs.

With respect to the cross claims for contractual indemnification among UNPC, C&W and Pritchard, there is evidence to indicate all three parties may have had at least constructive notice of the dangerous condition that allegedly caused the accident herein. The injured plaintiff testified that the water that formed the ice came from a leaky gutter located on the bottom part of the glass canopy. UNPC had overall responsibility for this dangerous condition as the landowner, C&W had responsibility pursuant to the Property Management Agreement to repair and maintain the leaky gutter, and Pritchard had responsibility pursuant to the Cleaning Services Agreement to remove ice and snow from the sidewalks. The injured plaintiff

added that he had observed water leaking from the gutter on the day of his accident and on numerous prior occasions, that ice accumulated on the sidewalk as a result of water leaking from the gutter approximately a dozen times a year, and that he had heard about other people falling on the ice in the past. There is evidence that C&W knew about the recurring icy sidewalk condition based on this testimony that the injured plaintiff had told his supervisor at C&W about the condition but was unaware of any efforts made to stop the leak. If Pritchard was aware of ice forming on the sidewalk on a regular basis, it would be obligated to tell someone at C&W or UNPC about it so those entities could take the necessary precautions during the days/hours Pritchard's porters were not on site to remove it. In any event, all three parties could have had constructive notice by virtue of the prior lawsuit stemming from a virtually identical accident in which UNPC, C&W and, eventually, Pritchard, were named.

The extent to which the parties will be entitled to indemnification, however, will depend on the extent to which each party's negligence is determined to have contributed to the accident. Hence, the court correctly granted a conditional order of contractual indemnification in favor of UNPC against C&W. The agreement contains a sufficiently clear and unambiguous provision requiring C&W to indemnify UNPC for any liability arising out of C&W's negligence not otherwise covered by insurance, and the

provision only purports to indemnify UNPC to the extent it was not itself negligent (*see* General Obligations Law § 5-322.1[1]; *Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]; *Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 433 [2005]; *Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 [1997]; *Collins v Switzer Constr. Group, Inc.*, 69 AD3d 407, 408 [2010]). On the other hand, the Property Management Agreement also expressly requires UNPC to obtain a comprehensive general liability insurance policy and to name C&W as an additional insured under that policy, which UNPC concedes it failed to do. The court thus properly qualified that conditional order of indemnification to account for any out-of-pocket costs C&W might be entitled to recover from UNPC for the latter's failure to procure insurance for C&W (*see Inchaustegui v 666 5th Ave. Ltd. Partnership*, 96 NY2d 111, 114 [2001]).

The court also correctly granted UNPC and C&W conditional orders of contractual indemnification against Pritchard. The Cleaning Services Agreement expressly requires Pritchard to indemnify UNPC and its agent, C&W, for any liability arising out of Pritchard's negligence, and contains the requisite saving language, "to the fullest extent permitted by law," to ensure that UNPC and C&W will only be indemnified to the extent they are not responsible for the injured plaintiff's accident.

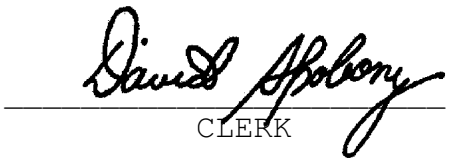
The court erred, however, in granting conditional orders of

indemnification in favor of Pritchard against C&W. Pritchard did not assert any cross claims for indemnification, based on common law or contract. Even if Pritchard had asserted a cross claim against C&W for common-law indemnification, it would be barred by Workers' Compensation Law § 11 because the injured party has not sustained a "grave injury." Furthermore, no contract exists between C&W and Pritchard that obligates C&W to indemnify Pritchard, thus precluding any claim by Pritchard for contractual indemnification against C&W.

We have considered the parties' remaining contentions and find them unavailing.

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

ENTERED: OCTOBER 21, 2010



CLERK

Sweeny, J.P., Freedman, Richter, Manzanet-Daniels, Román, JJ.

3426 In re Jaccob S.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

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Michael S. Bromberg, Sag Harbor, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Cheryl Payer of counsel), for presentment agency.

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Order, Family Court, Bronx County (Clark V. Richardson, J. at fact-finding hearing; Monica Drinane, J. at disposition), entered on or about August 18, 2009, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act which, if committed by an adult, would constitute the crime of menacing in the third degree, and placed him on probation for a period of 12 months, unanimously reversed, on the law, without costs, and the petition dismissed.

The court's finding was based on legally insufficient evidence. A person commits the crime of third-degree menacing when, "by physical menace, he or she intentionally places or attempts to place another person in fear of death, imminent serious physical injury or physical injury" (Penal Law § 120.15). According to the complainant's testimony, while appellant's companion made physically menacing gestures and stated, "Get out

of my face, before I cut you, you Mexican," appellant merely told complainant to "swim back to [his] country." Appellant's offensive comment, by itself, was insufficient to support the charge, which requires "physical menace" (*see Matter of Akheem B.*, 308 AD2d 402, 403 [2003], *lv denied* 1 NY3d 506 [2004]). Even assuming appellant's companion committed acts constituting third-degree menacing, the evidence does not support an inference that, in making this crude remark, appellant shared his companion's intent to place the complainant in fear of harm, or intentionally aided his companion in doing so (*see* Penal Law § 20.00).

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

ENTERED: OCTOBER 21, 2010

CLERK

Sweeny, J.P., Freedman, Richter, Manzanet-Daniels, Román, JJ.

3427 The People of the State of New York, Ind. 812/07
Respondent,

-against-

Karl Parson,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Daniel A. Warshawsky of counsel), and Davis Polk & Wardwell LLP, New York (Andrew Schlichter of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Britta Gilmore of counsel), for respondent.

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Judgment, Supreme Court, New York County (Carol Berkman, J. at hearing; Ruth Pickholz, J. at trial and sentence), rendered February 5, 2008, convicting defendant of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of 7 years, unanimously affirmed.

The court properly denied defendant's suppression motion. The records supports the court's findings, made after it viewed a surveillance videotape of the incident as well as hearing the officers' testimony. The furtive and suspicious activity seen by the observing officer and depicted on the videotape leads to the inescapable conclusion that defendant unlocked the trunk of a car, took out drugs, and sold them to another person whose change in demeanor showed that he used them immediately. The pattern of

behavior, viewed as a whole, lacked any innocent explanation (*see e.g. People v DiMatteo,* 62 AD3d 418 [2009]). Probable cause does not require proof beyond a reasonable doubt (*see Brinegar v United States*, 338 US 160, 175 [1949]; *People v Bigelow*, 66 NY2d 417, 423 [1985]). This pattern provided probable cause for defendant's arrest, as well probable cause to believe there were additional drugs in the car, thus justifying the search under the Fourth Amendment's automobile exception (*see DiMatteo, supra*). Defendant's argument that his relationship to the car was "attenuated" is without merit; as noted, the only reasonable interpretation of the hearing evidence is that he was selling drugs from a supply kept in the trunk of the car.

Defendant failed to preserve his claim that the court should have given the jury a circumstantial evidence charge, and we decline to review it in the interest of justice. As an alternative holding, we find that no such charge was necessary (*see People v Daddona*, 81 NY2d 990 [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 21, 2010

CLERK

Sweeny, J.P., Richter, Manzanet-Daniels, Román, JJ.

3428 In re Rebecca Perl, Index 500006/06
Petitioner-Appellant,

For the Appointment of a Guardian of the Property of Shari Perl, etc.,

-against-

Martin Evans,
Respondent-Respondent.

_____

Caraway & Sciacca, LLP, New York (Thomas Sciacca of counsel), for appellant.

Bressler, Amery & Ross, P.C., New York (David H. Pikus of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered June 27, 2009, which, to the extent appealed from as limited by the briefs, denied the petition to terminate the guardianship of the property of petitioner's daughter, Shari Perl, or, in the alternative, to remove respondent guardian for cause, unanimously affirmed, without costs.

The court's finding that Shari continues to require a property guardian is amply supported by Shari's testimony, respondent's testimony, and the testimony of a court-appointed psychiatrist, who concluded that Shari has a "cognitive deficit" that may not impair her ability to manage many "every day issues"

but renders her "deficient" in making "more major decisions that involve planning and forward thinking" (*see* Mental Hygiene Law § 81.36[a][1]). The testimony established that, while Shari is able to handle her considerable monthly allowance, she is vulnerable to exploitation and is not prepared to manage the entirety of her wealth.

Petitioner failed to present any ground for removing respondent as Shari's property guardian (*see* Mental Hygiene Law § 81.35). The evidence established that respondent acted diligently to safeguard Shari's property and that the degree of independence he afforded Shari was consistent with the terms of the guardianship order and with Shari's functional level. Any deficiencies in respondent's filing of annual accounts were relatively minor, did not prejudice Shari's property interests, and in any event could be remedied in ways other than removing him as guardian (*see Matter of Gustafson*, 308 AD2d 305, 308 [2003]). Further, respondent's retention of his firm in his capacity as trustee of a trust of which Shari is a beneficiary does not violate the rule prohibiting a guardian from appointing his firm as counsel (22 NYCRR 36.2[c][8]).

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: OCTOBER 21, 2010

CLERK

Sweeny, J.P., Freedman, Richter, Manzanet-Daniels, Román, JJ.

3429-
3430- Steven Cole, Index 112295/05
3430A Plaintiff, 590743/06
590114/09
-against- 590359/10

Jason Mraz, et al.,
Defendants.
- - - - - -
Jason Mraz,
Third-Party Plaintiff,

-against-

Delicate Productions, Inc.,
Third-Party Defendant-
Appellant-Respondent,

Clear Channel Entertainment, et al.,
Third-Party Defendants,

The Beacon Theater, et al.,
Third-Party Defendants-
Respondents-Appellants.

_____

Mound Cotton Wollan & Greengrass, New York (Kenneth M. Labbate and Steven A. Torrini of counsel), for appellant-respondent.

Dillon Horowitz & Goldstein, LLP, New York (Thomas Dillon of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Paul G. Feinman, J.), entered July 23, 2009, to the extent it denied the motion by third-party defendants Beacon Theatre and Babylon Enterprises for summary dismissal of cross claims against them by third-party defendant Delicate Productions, unanimously affirmed, without

costs. Appeal by Delicate from the same order, insofar as it dismissed Delicate's cross claims against Beacon and Babylon, unanimously dismissed, without costs, as subsumed in the appeal from a later order. Order, same court and Justice, entered April 12, 2010, to the extent it granted third-party defendant Delicate's motion to reargue the prior order and converted its cross claims against third-party defendants Beacon and Babylon into a third third-party action, unanimously modified, on the law, the third third-party action is directed to be tried with the main action, and otherwise affirmed, without costs.

Plaintiff, a union stagehand, was injured when a light fixture fell on his head at the Beacon Theater as he was cleaning the stage after a performance by defendant Mraz. Plaintiff sued, inter alia, Mraz and Delicate, the company from whom Mraz leased the lighting equipment. Mraz, in turn, commenced a third-party action against Delicate, the Beacon Theater, and Babylon. In its answer to the third-party action, Delicate asserted cross claims against Beacon and Babylon.

Mraz then moved for summary judgment dismissing plaintiff's complaint, which was granted without opposition in the July 23 order. All claims asserted against Mraz were dismissed, as were the claims he asserted in his third-party action. As a consequence, the cross claims asserted by Delicate against Babylon and Beacon in Mraz's third-party action were dismissed,

but Delicate was granted leave to pursue those cross claims in a third third-party action against Babylon and Beacon. Rather than commence such an action outright, Delicate moved for reargument, claiming it was error for the court not to automatically convert those cross claims into a third third-party action. Upon reargument, the court did convert Delicate's cross claims into a third third-party action, severing it from the main action and directing Delicate to purchase a new index number. Delicate now argues the court erred in severing the cross claims for trial instead of automatically converting them into a third third-party action under the Mraz action's index number.

To the extent Delicate still maintains that it was error for the court not to automatically convert its cross claims into a third-party action, the appeal is moot, because such relief was granted on reargument. The purchase of a new index number was necessary because the Mraz third-party complaint had been dismissed in its entirety, taking with it the court's jurisdiction over Beacon and Babylon, since no other entity in this litigation had directly sued Beacon and Babylon.

Delicate is correct, however, that the court erred in severing its third-party action. Severance of a cross claim is a discretionary measure that should be exercised sparingly, and where, as here, there are factual and legal issues common to the main action and Delicate's third-party action, that exercise was

improvident (*see Curreri v Heritage Prop. Inv. Trust, Inc.*, 48 AD3d 505, 507 [2008]). The interests of judicial economy will be served by having a single trial.

On Delicate's cross claim for contribution and indemnification, the court correctly determined that issues of fact precluded summary judgment in favor of Beacon and Babylon.

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

ENTERED: OCTOBER 21, 2010

CLERK

Sweeny, J.P., Freedman, Richter, Manzanet-Daniels, Román, JJ.

3431 The People of the State of New York, Docket 19147/05
Respondent,

-against-

Ramon Reynoso,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Allen H. Saperstein of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered March 5, 2007, convicting defendant, after a nonjury trial, of public lewdness, and sentencing him to a term of 1 year's probation, unanimously affirmed.

The superceding information charging defendant with public lewdness pursuant to Penal Law § 245.00(a) was facially sufficient. The "public place" requirement was satisfied by allegations that adequately described the premises (an entry vestibule), defendant's conduct and the surrounding circumstances, so as to warrant the inference that defendant

committed a lewd act in a place where he would likely be observed by casual passersby (*see People v McNamara*, 78 NY2d 626 [1991]).

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

ENTERED: OCTOBER 21, 2010

CLERK

Sweeny, J.P., Freedman, Richter, Manzanet-Daniels, Román, JJ.

3432-
3433 The People of the State of New York, Ind. 277/08
Respondent,

-against-

David Price,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered November 17, 2008, as amended February 25, 2009, convicting defendant, after a jury trial, of assault in the second degree and criminal possession of a weapon in the third degree, and sentencing him, as a second violent felony offender, to an aggregate term of 7 years, unanimously affirmed.

Defendant did not preserve his claim that the court should have given the jury a specific instruction on how to consider a witness's prior criminal convictions in assessing credibility, and we decline to review it in the interest of justice. We reject defendant's argument that his claim should he deemed preserved because the prosecutor asked the court a question at the end of its charge that supposedly alluded to the same issue defendant is raising on appeal. As an alternative holding, we

find that the court's charge, viewed as a whole, sufficiently instructed the jury on the subject of credibility (*see People v Whalen*, 59 NY2d 273, 279 [1983]).

Defendant did not preserve any of his challenges to the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

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

ENTERED: OCTOBER 21, 2010

CLERK

Sweeny, J.P., Freedman, Richter, Manzanet-Daniels, Román, JJ.

3434 Zeng Xi Chen, Index 102148/06
Plaintiff-Respondent,

-against-

Jeffrey Spitz, et al.,
Defendants.
- - - - -
Lu Gang,
Nonparty-Appellant.

_____

Victor Tsai, New York, for appellant.

Caesar & Napoli, New York (Dana M. Northcraft of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered October 2, 2009, which, inter alia, granted plaintiff's motion for nunc pro tunc approval, pursuant to Workers' Compensation Law § 29(5), of the third-party settlement in the underlying personal injury action, unanimously affirmed, without costs.

The court reviewed in detail the history of this action and correctly found that the record demonstrates that nonparty appellant Lu Gang was deemed by a special referee to be plaintiff's employer at the time of the accident in which plaintiff was injured and that he had not procured workers' compensation insurance for plaintiff. Thus, the Uninsured Employers' Fund (UEF), acting as the workers' compensation

carrier pursuant to Workers' Compensation Law § 26-a(2), had the right to and ultimately did consent to the $25,500 settlement in the underlying action (*see* Workers' Compensation Law § 29[5]).

While, as nonparty appellant points out, court approval of the settlement was not sought within three months after the settlement date (*see id.*), plaintiff established that the delay did not result from his fault or neglect and that the UEF was not prejudiced by it (*see Merrill v Moultrie*, 166 AD2d 392 [1990], *lv denied* 77 NY2d 804 [1991]).

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

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

ENTERED: OCTOBER 21, 2010

CLERK

Sweeny, J.P., Freedman, Richter, Manzanet-Daniels, Román, JJ.

3435 The People of the State of New York, Ind. 314/03
Respondent,

-against-

Delvin Espinal,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Nicole Coviello of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ronald A. Zweibel, J.), entered on or about November 19, 2009, which specified and informed defendant that the court would resentence him to a term of 7 years, followed by 3 years' postrelease supervision, for his conviction of criminal sale of a controlled substance in the third degree, unanimously affirmed, and the matter remanded to Supreme Court, New York County for further proceedings upon defendant's application for resentencing.

We perceive no basis for reducing the proposed term, which was offered upon consideration of all the appropriate factors,

including defendant's prison disciplinary record (*see People v Rincon*, 40 AD3d 538 [2007], *lv denied* 9 NY3d 880 [2007]).

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

ENTERED: OCTOBER 21, 2010

CLERK

Sweeny, J.P., Freedman, Richter, Manzanet-Daniels, Román, JJ.

3436 Group IX, Inc., Index 601034/07
Plaintiff-Appellant-Respondent,

-against-

Next Printing & Design Inc., et al.,
Defendants-Respondents-Appellants,

Ofer Geva, et al.,
Defendants.

_____

Sadis & Goldberg, LLC, New York (Douglas R. Hirsch of counsel), for appellant-respondent.

Morrison Cohen LLP, New York (David A. Piedra of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered January 8, 2010, which, upon reargument, granted in part and denied in part the motion by defendants Next Printing & Design Inc. and David Moyal for summary judgment dismissing the complaint, unanimously modified, on the law, to deny so much of the motion as was granted, and otherwise affirmed, without costs.

Defendants failed to file their motion within the 120 days specified by CPLR 3212(a) and offered no reason for the delay. Thus, in its prior order, the court correctly denied the motion as untimely (*Brill v City of New York*, 2 NY3d 648 [2004]).

CPLR 2103(b)(2), which provides that "where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed

period," is inapplicable to the making of a summary judgment motion, for which the period prescribed by CPLR 3212(a) is measured not by the service of a paper but by the filing of the note of issue.

To the extent that *Luciano v Apple Maintenance & Servs.* (289 AD2d 90 [2001]) and *Szabo v XYZ, Two Way Radio Taxi Assn.* (267 AD2d 134 [1999]), the cases on which the court relied in altering its determination on reargument, permit a five-day extension of the filing deadline for summary judgment motions pursuant to CPLR 2103(b)(2), they should not be followed. *Luciano* and *Szabo* were decided before the Court of Appeals announced in *Brill* that courts may not consider the merits of an untimely summary judgment motion *for any reason* other than "good cause for the delay in making the motion" (2 NY3d at 652).

In view of the foregoing, we do not reach the parties' arguments as to the merits of the motion.

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

ENTERED: OCTOBER 21, 2010

CLERK

Sweeny, J.P., Freedman, Richter, Manzanet-Daniels, Román, JJ.

3437 The People of the State of New York, SCI 7232C/09
Appellant,

-against-

Jose Mora-Hernandez,
Defendant-Respondent.

_____

Robert T. Johnson, District Attorney, Bronx (Stanley R. Kaplan of counsel), for appellant.

M. Chris Fabricant, John Jay Legal Services, White Plains (Elizabeth M. Frederick of counsel), for respondent.

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Order, Supreme Court, Bronx County (Caesar D. Cirigliano, J.), entered on or about May 19, 2009, which granted defendant's suppression motion, unanimously affirmed.

The court properly granted defendant's motion to suppress the results of a breathalyzer test and the videotape made of the test on the ground that the officers violated his right to counsel. The police ignored defendant's repeated requests for counsel prior to the administration of the test. A defendant who has been arrested for driving while intoxicated and requests assistance of counsel generally has the right to consult with an attorney before deciding whether to consent to a sobriety test (*People v Shaw*, 72 NY2d 1032 [1988]). As in *People v Gursey*, 22 NY2d 224 (1968), the officers prevented defendant from contacting his lawyer when there was no indication that granting defendant's

request would have substantially interfered with the investigative procedure. The record contradicts the People's contention that defendant voluntarily abandoned his request for counsel when he agreed to take the test.

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

ENTERED: OCTOBER 21, 2010

CLERK

Sweeny, J.P., Freedman, Richter, Manzanet-Daniels, Román, JJ.

3438 The People of the State of New York, Ind. 1672/08
Respondent,

-against-

Jasmine Grooms,
Defendant-Appellant.

_____

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

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Judgment, Supreme Court, Bronx County (Dineen Ann Riviezzo, J.), rendered on or about July 9, 2009, 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 21, 2010

CLERK

Freedman, J.P., Richter, Manzanet-Daniels, Román, JJ.

3439N The Law Firm of Ravi Batra, P.C., Index 100548/06
Plaintiff-Appellant,

-against-

Amora Rachel Leah Rabinowich,
Defendant-Respondent.

_____

The Law Firm of Ravi Batra, P.C., New York (Ravi Batra of counsel), for appellant.

The Barbara Law Firm, Garden City (Judith A. Ackerman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marilyn B. Dershowitz, Referee), entered November 18, 2008, which, inter alia, denied in part plaintiff's motion to quash a subpoena and for a protective order, unanimously modified, on the law, to the extent of granting the motion to quash the subpoena and granting plaintiff a protective order, and otherwise affirmed, without costs.

Plaintiff represented defendant for a brief time in 2005. Following the breakdown of the parties' relationship, plaintiff asserted a retaining lien on defendant's file and sought to have its outstanding fees satisfied before turning over the file. Defendant neither paid the outstanding fees nor posted an undertaking to secure plaintiff's payment.

Plaintiff then commenced this action for counsel fees and

was granted a default judgment following defendant's default. The matter was thereafter referred for a hearing on the issue of damages. After the hearing had commenced, defendant issued a subpoena, seeking "copies of all retainer agreements signed by Defendant, memoranda, records, copies of the Defendant's file, and all other evidences and writings, which you have in your custody or power related to the Defendant."

In deciding plaintiff's motion to quash the subpoena and for a protective order, the motion court ordered plaintiff to produce all time records and back up documentation for the time claimed, including, but not limited to, letters, e-mails, research memos and records of telephone calls, as well as proof of fees received. The court ordered the remainder of the file to be indexed and provided for an in camera review.

It was error to "permit a defaulting defendant to conduct discovery of the plaintiff in preparation for an appearance at inquest" (*Yeboah v Gaines Serv. Leasing*, 250 AD2d 453, 454 [1998]). Indeed, while defendant is entitled to contest damages and to offer proof on that issue, "by virtue of [her] default, defendant is not entitled to discovery from plaintiff on th[e] issue[]" (*Toure v Harrison*, 6 AD3d 270, 272 [2004]). Nor may a subpoena be "used as a substitute for pretrial discovery" (*Soho Generation of N.Y. v Tri-City Ins. Brokers*, 236 AD2d 276, 277 [1997]).

Further, inasmuch as defendant defaulted and thus cannot challenge the validity of plaintiff's retaining lien on the file, and defendant has not posted a bond, it was error to order the turnover of any portion of the file (*see Warsop v Novik*, 50 AD3d 608 [2008]). It is only where there is no outstanding claim for unpaid legal fees that a client "presumptively" has access to its file (*Matter of Sage Realty Corp. v Proskauer Rose Goetz & Mendelsohn*, 91 NY2d 30, 34 [1997]).

In any event, the subpoena was over-broad as it sought all documents related to defendant and did not differentiate between materials maintained by plaintiff in its representation of defendant with those maintained and prepared in anticipation of and during this action. Moreover, a subpoena duces tecum "may not be used for the purpose of discovery or to ascertain the existence of evidence" (*People v Gissendanner*, 48 NY2d 543, 551 [1979]) and a subpoena should be quashed when the subpoena is being used for a fishing expedition to ascertain the existence of evidence (*Matter of Office of Attorney Gen. of State of N.Y.*, 269 AD2d 1, 13 [2000]). However, this does not eliminate the obligation for plaintiff to ensure that his file is available for inspection either by the referee or the defendant during the inquest.

We do not find that the issuance of the subpoena warrants the imposition of sanctions on defendant and her counsel.

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

ENTERED: OCTOBER 21, 2010

CLERK