SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 8, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Mazzarelli, Gonzalez, Sweeny, McGuire, JJ.

2498 Steven B. Samuel, Esq., et al., Index 114483/05
Plaintiffs-Respondents-Appellants,

-against-

Druckman & Sinel, LLP, et al.,
Defendants-Appellants-Respondents.

Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for appellants-respondents.

Daniel J. Dillon, Lido Beach, for respondents-appellants.

Order, Supreme Court, New York County (Debra A. James, J.), entered April 4, 2007, which denied defendants' motion and plaintiffs' cross motion for summary judgment as well as plaintiffs' effort to have the matter referred to the judge who had approved the compromise settlement for award of legal fees in the underlying medical malpractice case, modified, on the law and the facts, defendants' motion for summary judgment on its first counterclaim granted to the extent it seeks one third of the $805,767.30 legal fee awarded under Judiciary Law § 474-a(2) in the underlying medical malpractice action, plaintiffs' cross motion for summary judgment declaring the rights of the parties granted to the same extent and otherwise affirmed, without costs.

The Clerk is directed to enter judgment in favor of defendant Druckman & Sinel and against plaintiff Samuel & Ott in the principal amount of $268,589, with statutory interest from April 7, 2007.

Following settlement of a medical malpractice action for $6.7 million in May 2005, the trial court issued an infant's compromise order directing the defendant therein to pay legal fees (including disbursements) of $1,137,826.41 to the plaintiff's law firm (Samuel & Ott) and $762,173.59 to co-counsel Pegalis & Erickson. This was greater than the $805,767.30 to which Samuel & Ott would have been entitled under the statutory sliding scale. Attorney Samuel justified the enhanced fee by pointing out that his firm was required to pay out of its portion both the Pegalis firm, which had joined in performing extraordinary services, as well as Sinel, the referring attorney, and that if limited to the fee under the statutory sliding scale, his and the Pegalis firms would not be adequately compensated for the thousands of hours expended in developing and trying this complex case. Attorney Pegalis offered his own statement citing his expert contribution to the successful settlement of the case, which involved brain injury suffered by an infant in the course of childbirth.

When Sinel insisted on one third of the entire enhanced amount awarded to Samuel and Pegalis, Samuel commenced the

instant action, alleging that *any* award to Sinel's firm would be prohibited under Code of Professional Responsibility DR 2-107 (22 NYCRR 1200.12) and requesting that the court declare the parties' respective rights. Sinel counterclaimed for $588,832.08, which was approximately one third of the combined, enhanced fees awarded to the Samuel and Pegalis firms, net of disbursements, plus $3,000 in disbursements. Plaintiffs cross-moved for an order declaring that Sinel and his firm were not entitled to any portion of the legal fee awarded. The motion court denied the parties' respective motions on the ground that the papers submitted were inadequate. We find that the record permits, and indeed requires, summary resolution of this dispute on the merits (*State of New York v Metz*, 241 AD2d 192, 196-202 [1998]).

Contrary to plaintiffs' contention, Sinel demonstrated that he "actually contributed to the legal work" through initial investigation, and there is no claim that he ever refused a request to contribute more substantially (*Benjamin v Koeppel*, 85 NY2d 549, 556 [1995]). Further, by disclosing to the client in writing that he was bringing in Samuel & Ott as trial counsel to handle the bulk of the work, and that no additional fee would be charged to the client as a result, Sinel demonstrated sufficient compliance with DR 2-107(A). Consistent with the parties' fee-sharing and retainer agreements, the Sinel firm is thus entitled to its one-third share of the amount recovered by the Samuel firm

under the statutory sliding scale applicable in malpractice cases, without regard to any arrangement made between the Samuel and Pegalis firms (*see Borgia v City of New York*, 259 AD2d 648 [1999]; *Gair, Gair & Conason v Stier*, 123 AD2d 556 [1986], *lv denied* 69 NY2d 606 [1987]).

However, Sinel made no contribution to the extraordinary services provided by Samuel and Pegalis that resulted in the trial court granting their application for an enhanced award of legal fees over the normal sliding scale. Under the circumstances, allowing Sinel to share in any portion of the enhanced award would result in a fee grossly disproportionate to the services rendered. It would result in defendants, the referring attorneys, being awarded a fee larger than plaintiffs, the attorneys who did the bulk of the work. Clearly, this could not have been the intent of the attorneys when they entered into their agreement nor can it be consistent with this Court's

obligation to oversee the reasonableness of legal fees (*see Dugan v Dorff Constr. Co.*, 281 AD2d 158 [2001], *lv denied* 98 NY2d 606 [2002]; Code of Professional Responsibility DR2-106 [22 NYCRR 1200.11]).[1]

All concur except Gonzalez and McGuire, JJ. who dissent in a memorandum by McGuire J. as follows:

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[1]The dissent's concern that by this decision we are encouraging further litigation is misplaced. None of the cases cited by the dissent, and in fact, none of the authorities those cases relied on, dealt with anything other than the usual statutory awards.

McGUIRE, J. (dissenting)

I agree with the majority that, for the reasons it states, Supreme Court erred in not deciding the motion and cross motion and that defendant Sinel's law firm is entitled to a share of the $1.9 million legal fee awarded in the medical malpractice action. I also agree that the right of Sinel's law firm to a share of the fee is not affected by the arrangement made between plaintiff Samuel's law firm and the Pegalis law firm (*see Borgia v City of New York*, 259 AD2d 648 [1999]). I respectfully disagree with the majority's determination not to enforce as written the agreement between Sinel's law firm and Samuel's law firm providing that the former "will be compensated at the rate of one-third of the entire legal fee recovered for our participation in this matter, upon its conclusion by settlement, verdict or otherwise." In effectively rewriting the agreement, the majority contradicts controlling and well-settled precedent dealing with such fee agreements and with contract law generally. Moreover, the majority establishes a precedent that will encourage -- and enmesh the judiciary in -- needless and standardless litigation.

What the Court of Appeals stated in *Benjamin v Koeppel* (85 NY2d 549, 556 [1995]) applies with equal force in this case. There, a law firm sought to avoid its contractual obligation to pay to an attorney who referred work to the firm one-third of any fees the firm earned on the ground that the attorney had not

complied with mandatory registration requirements. After holding that precluding the attorney from recovering on his contract was "wholly out of proportion to the requirements of public policy" (*id.* at 556 [internal quotation marks omitted]), the Court went on to state as follows:

> "In closing, we also note our rejection of defendants' contention that the fee-sharing agreement plaintiff seeks to enforce is invalid as a matter of professional ethics (*see*, Code of Professional Responsibility DR 2-107). It has long been understood that in disputes among attorneys over the enforcement of fee-sharing agreements the courts will not inquire into the precise worth of the services performed by the parties as long as each party actually contributed to the legal work and there is no claim that either 'refused to contribute more substantially' (*Sterling v Miller*, 2 AD2d 900, *affd* 3 NY2d 778; *see*, *Witt v Cohen*, 192 AD2d 528; *Oberman v Reilly*, 66 AD2d 686; *Rozales v Pegalis & Wachsman*, 127 AD2d 577; *Jontow v Jontow*, 34 AD2d 744, 745; *Fried v Cahn*, 239 App Div 213; *Carter v Katz, Shandell, Katz & Erasmous*, 120 Misc2d 1009, 1018-1019; *see also*, *Stissi v Interstate & Ocean Transp. Co.*, 814 F2d 848, 852). Moreover, it ill becomes defendants, who are also bound by the Code of Professional Responsibility, to seek to avoid on 'ethical' grounds the obligations of an agreement to which they freely assented and from which they reaped the benefits (ABA Comm on Professional Ethics, Informal Opn No. 870)."

This Court has repeatedly followed that "well[-]settled" rule

(*see e.g. Stinnett v Sears Roebuck & Co.*, 201 AD2d 362 [1994]; *Gore v Kressner*, 157 AD2d 575 [1990], *lv denied* 76 NY2d 701 [1990]). So, too, have the other Departments (*see e.g. Reich v Wolf & Fuhrman, P.C.*, 36 AD3d 885 [2nd Dept 2007], *lv denied* 9 NY3d 812 [2007]; *Matter of Cohen Swados Wright Hanifin Bradford & Brett v Frank R. Bayger, P.C.*, 269 AD2d 739 [4th Dept 2000]).

The majority's approach also is contrary to first principles of contract law. "Freedom of contract prevails in an arm's length transaction between sophisticated parties ... and in the absence of countervailing public policy concerns there is no reason to relieve them of the consequences of their bargain" (*Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 695 [1995]; *see also Miller v Continental Ins. Co.*, 40 NY2d 675, 679 [1976] ["It is well to remember too that 'the right of private contract is no small part of the liberty of the citizen, and the usual and most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appears that they contravene public right or the public welfare'"], quoting *Baltimore v Ohio Ry. Co. v Voight*, 176 US 498, 505 [1900]). Obviously enough, lawyers who practice in a specialized field like medical malpractice are sophisticated parties. When they enter into written agreements that govern their compensation, they do not become bumpkins.

Yet, the majority does not permit freedom of contract to prevail.

Another fundamental precept of contract law is that in the absence of ambiguity, written agreements should be enforced according to their terms (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004] ["when parties set down their agreement in a clear, complete document, their writing should ... be enforced according to its terms"]). The relevant terms of this agreement ("one-third of the entire legal fee recovered for our participation in this matter, upon its conclusion by settlement, verdict or otherwise") are clear and unambiguous (*see Cohen Swados*, 269 AD2d at 741 ["The letter agreements between Cohen Swados and Bayger unambiguously provide that Cohen Swados is to receive 16% of any settlement or verdict in the underlying action"]). Nonetheless, the majority does not enforce it according to its terms. To the extent that the majority believes that enforcing the agreement in accordance with its terms would be unfair to plaintiff Samuel's law firm, the majority also errs (*see Greenfield v Philles Records*, 98 NY2d 562, 570 [2002] ["a court is not free to alter the contract to reflect its personal notions of fairness and equity"]; *Breed v Ins. Co. of N. Am.*, 46 NY2d 351, 355 [1978] ["This court may not make or vary the contract ... to accomplish its notions of abstract justice or moral obligation"]).

Similarly, the majority's approach is at odds with the

principles that govern the interpretation of written contracts entered into between sophisticated parties negotiating at arm's length:

> "In such circumstances, courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include. Hence, courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Vermont Teddy Bear Co.*, 1 NY3d at 475 [internal quotation marks and citations omitted]).

The majority errs by reading into the written, fee-sharing agreement a term that is not in the agreement. The agreement specifies that plaintiff Samuel's law firm "will be compensated at the rate of one-third of the entire legal fee recovered," not that the firm "will be compensated at the rate of one-third of the entire legal fee recovered other than any portion thereof reflecting an enhanced award for extraordinary services provided by it or by any other attorneys it may engage."

The majority also errs in expressly relying on the belief that enforcing the agreement as written (or, to put it as the majority does, "allowing Sinel to share in any portion of the enhanced award") would result in a fee "grossly disproportionate to the services rendered." Whether the fee to Sinel would be disproportionate to the services rendered is irrelevant. The majority's error is apparent when one considers that the majority

can come to this conclusion only after doing that which it has "long been understood" a court will not do: "inquire into the precise worth of the services performed ... as long as each party actually contributed to the legal work and there is no claim that either refused to contribute more substantially" (*Benjamin v Koeppel*, 85 NY2d at 556 [internal quotation marks omitted]). The recent decision by the Second Department in *Robert P. Lynn, Jr., LLC v Purcell* (40 AD3d 729 [2007]) is right on point:

> "[DR 2-107(a)(2) (22 NYCRR 1200.12[a][2])] thus allows an attorney, in a situation involving joint representation by attorneys from different firms, to recover a fee *disproportionate to the value of the services provided* if the attorneys have assumed joint responsibility for the representation, the client has been advised in writing of the joint representation and the attorneys have agreed to the amount of the fee. 'In short, if lawyers in different firms have taken joint responsibility and have given the client a writing to that effect, then they may divide the fees in any way they wish as long as the total fee is reasonable' (Simon, New York Code of Professional Responsibility Annotated at 341 [2006 ed])" (40 AD3d at 730-731 [emphasis added]).

The majority notes that enforcing the agreement as written "would result in defendants, the referring attorneys, being awarded a fee larger than plaintiffs, the attorneys who did the bulk of the work." According to the majority, this "[c]learly ... could not have been the intent of the attorneys when they entered into their agreement nor can it be consistent with this Court's obligation to oversee the reasonableness of legal fees."

First of all, however, nothing in the agreement itself supports this conclusion about the parties' intent, and this conclusion is inconsistent with another basic precept of contract interpretation (*see Slamow v Del Col*, 79 NY2d 1016, 1018 [1992] ["The best evidence of what parties to a written agreement intend is what they say in their writing"]). Second, without the referral made by defendants, plaintiffs would not have had *any* work to do on the malpractice action. The majority's conclusion about the parties' ostensibly "clear[]" intent rests in part on an implicit appraisal by the majority of the relative unimportance to the sophisticated attorneys who practice in the medical malpractice field of getting as compared to working on cases. The majority's conclusion falls apart once it is recognized that at least some practitioners may have a different view. As discussed below, moreover, judges do not have any special competence to make this or any of the related evaluations that inform the decisions of attorneys who enter into fee-sharing agreements. Third, the judiciary's "obligation to oversee the reasonableness of legal fees" is irrelevant. Regardless of how this dispute between the attorneys about how the fee should be shared is resolved, the fee paid by the client will not change. Finally, the judiciary has another responsibility that is relevant here: not to permit attorneys "to seek to avoid on 'ethical' grounds the obligations of an agreement to which they

freely assented and from which they reaped the benefits" (*Benjamin*, 85 NY2d at 556).

The lone case the majority cites in support of its position, *Dugan v Dorff Constr. Co.* (281 AD2d 158 [2001], *lv denied* 98 NY2d 606 [2002]), is distinguishable. There, firm A, which originally handled the underlying personal injury action, retained firm B, and the two firms entered into a fee-sharing agreement pursuant to which firm B was to receive two-thirds of the fee ultimately received. Firm B, however, was discharged shortly after it was retained "after having performed minimal preliminary work on the case" (281 AD2d at 159), and the case was transferred back to firm A. Thereafter, firm B sought to recover two-thirds of the fee received by firm A. In the course of refusing to uphold firm B's claim under the agreement, this Court adverted to its "inherent power to ensure that a fee charged by a firm be commensurate with the reasonable services rendered to a client" (*id.*). There, as in this case, however, the amount of the fee paid by the client was not affected by the dispute between the attorneys. In refusing to uphold firm B's contract claim, moreover, this Court did not write a new agreement for the parties. Rather, it essentially invalidated the contract and left firm B with a quantum meruit claim (*id.* ["we limit ... firm [B] to a pro rata recovery of the value of the work it actually performed"]). And this Court did so because the agreement

"clearly contemplated that ... firm [B] would try the case to completion, not that the litigation would be returned to [firm A] after less than a month" (*id.*). Thus, *Dugan* should be viewed as a mutual mistake of fact case (*see Matter of Gould v Board of Educ. of Sewanhaka Cent. High School Dist.*, 81 NY2d 446, 453 [1993]), not as an anomaly or trail-blazing precedent.

The precedent the majority establishes, however, will take attorneys and courts down an unfortunate path. The litigation the majority encourages will be needless because the sophisticated parties who are the subject of the majority's solicitude are fully capable of protecting themselves. The litigation the majority encourages will be standardless because each case will turn on nothing other than an ad hoc judgment as to whether, all things considered, a judge regards the particular fee to be "too much." The competence of judges to make these judgments -- given that the attorneys who enter into fee-sharing agreements consider a slew of variables, including their particular economic circumstances at the time, tolerance for risk and appraisal of the likelihood of success -- is at least questionable. Perhaps some benefits may be obtained from time to time when fee-sharing agreements are judicially modified in a quest to satisfy the nebulous goal of ensuring that each attorney's share is sufficiently proportionate to the services rendered. But there will be countervailing costs. The

litigation costs that will be incurred as fee-sharing agreements are attacked on the basis of subsequent events may be substantial. The majority's decision certainly creates powerful incentives for attorneys to cry foul. Whatever the precise extent of the unnecessary litigation costs, the majority's decision introduces a measure of uncertainty into many if not all fee-sharing agreements.[1]

One of the virtues of the "long[-]understood" rule acknowledged and approved in *Benjamin v Koeppel* is that it implicitly recognizes that courts are not well suited to make the kind of judgments that the majority's approach requires. As this Court recently stated in a similar context, "[t]hat the terms of an agreement may strike a court as unfair may reflect only an inadequate or incomplete appreciation of the complexities or commercial realities of a transaction" (*RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272, 274 [2007]). In this regard, I note that the majority directs that Sinel's law firm receive a fee that is almost $100,000 less than the amount offered by

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[1]The majority seeks both to distinguish all the cases that are at odds with its position and to limit the precedent it sets by arguing that none of the cases "dealt with anything other than the usual statutory awards." Even assuming that to be so, the rationale of those decisions (*see e.g. Benjamin v Koeppel, supra*) cannot be confined to cases involving only "the usual statutory awards." Similarly, the rationale offered by the majority -- the ostensible need to prevent a fee the majority regards as "grossly disproportionate to the services rendered" -- cannot be confined to cases involving only enhanced awards.

plaintiff Samuel (one-third of the amount of his firm's fee rather than the entire fee received) after the malpractice action settled.

For these reasons, I would enforce the agreement as written and grant defendants' motion for summary judgment.

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

ENTERED: APRIL 8, 2008

CLERK

Lippman, P.J., Tom, Williams, Acosta, JJ.

3207-
3208-
3209 The People of the State of New York, Respondent, Ind. 6613/04 1070/05 26/05

-against-

Jason Parker, also known as Darryl Glover, Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (John Schoeffel of counsel), and Willkie Farr & Gallagher, New York (Jared Cohen of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Budd G. Goodman, J.), rendered October 18, 2005, convicting defendant, upon his plea of guilty, of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed. Judgment, same court and Justice, rendered November 17, 2005, convicting defendant, upon his plea of guilty, of fraudulent accosting, and sentencing him to time served, unanimously affirmed. Judgment, same court and date (Marcy L. Kahn, J. at hearing; Budd G. Goodman, J. at jury trial and sentence), convicting defendant of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

Defendant's convictions arose out of a scheme in which he convinced victims that they could purchase computers at low

prices for cash. In one such incident, defendant approached Eric Toral at the corner of 44th Street and Eighth Avenue. The two men then conversed for "a couple of minutes" about the purchase of two Macintosh G-4 laptop computers. Toral later discussed the proposed transaction with defendant in a series of telephone conversations, and it was agreed that Toral would pay $2,200 for the two laptops. Toral arranged to take delivery from defendant at a McDonald's at 56th Street and Eighth Avenue in Manhattan. However, defendant did not appear at the prearranged location and persuaded Toral to meet him at the corner of 57th Street and Eighth Avenue. As defendant approached, Toral was grabbed from behind and restrained in a bear hug by an accomplice while an envelope containing the cash was removed from his jacket pocket by a second accomplice. Toral then watched the three men run off together towards Central Park.

At trial, the People sought to introduce evidence in connection with defendant's conviction of a similar crime for the avowed purpose of establishing his identity by demonstrating the similarity in modus operandi. Defendant opposed the People's motion and offered to concede the issue of identity. The trial court declined to accept defendant's concession and permitted testimony of the uncharged crime, delivering limiting instructions to the jury.

On appeal, defendant contends that the prejudice from the

introduction of evidence of the uncharged crime outweighed its probative value. The People argue that defendant did not offer a sufficient concession of his identity to render introduction of the *Molineux* evidence unnecessary.

In the absence of inquiry into the extent of the concession defendant was willing to make, its sufficiency cannot be assessed. In any event, the People have not demonstrated that the proffered concession would have failed to conclusively establish defendant's identity so as to warrant introduction of evidence of the uncharged crime (*People v Robinson*, 68 NY2d 541, 548 [1986]; *see People v Condon*, 26 NY2d 139, 142 [1970] [identity exception to *Molineux* rule unavailable "*where the identity of defendant is established by other evidence and is not truly in issue*"]; *People v Sanchez*, 154 AD2d 15, 24 [1990] [repeated offers to concede identification, defendant to testify to sexual contact]; *cf. People v Alvino*, 71 NY2d 233, 245 [1987] [evidence admitted to prove intent, which was not conceded]). Nor did limiting instructions eliminate the prejudice to defendant (*see Sanchez*, 154 AD2d at 22-23).

Toral had ample opportunity to view defendant at their first encounter while they discussed the transaction and was able identify defendant in a lineup. Toral testified that he spoke with defendant on the telephone on numerous occasions and was able to recognize his voice. Shortly after the theft, Toral

obtained defendant's home address from the telephone number recorded on his cell phone by consulting a reverse directory on the internet. Finally, the People introduced a record of calls placed by Toral to defendant's home. Thus, there was substantial evidence that defendant was the other party to the sham transaction, the details of which were established by the victim's testimony, and defendant's identity was not actually in issue (*Condon*, 26 NY2d at 142).

While we conclude that the trial court erred in admitting the challenged evidence, the error was harmless in view of the overwhelming proof of defendant's guilt (*People v Crimmins*, 36 NY2d 230, 241 [1975]). We discern no significant probability that the jury would have acquitted defendant if the *Molineux* evidence had been excluded (*id.; cf. People v Coppolo*, 30 AD3d 207, 209 [2006]).

The only material inconsistency in Toral's testimony identified by defendant is readily explained by the record. Toral originally reported the incident at the 79th Precinct in Brooklyn (because of its proximity to defendant's home), then at the 13th Precinct in Gramercy Park (his own neighborhood) and, finally, at the Midtown North Precinct (in which the crime was committed). On a single police report, the location of the crime was recorded as the southwest corner of Fifth Avenue and Broadway, not 57th Street and Eighth Avenue. However, the

officer who took that information worked in the Brooklyn precinct house and conceded his unfamiliarity with Manhattan. Another witness for the People testified that there is no such intersection because Fifth Avenue and Broadway are avenues that run essentially parallel to each other until they eventually meet at 23rd Street. Thus, there is abundant evidence upon which to conclude that the location stated on the report made at the 79th Precinct was simply the result of human error.

Other asserted deficiencies in the evidence are even less compelling. On summation, defendant relied on the challenged testimony from the victim of the uncharged crime that he was merely duped out of his money without the use of any force, urging the jury to reject Toral's testimony that force was used against him. Acquittal on the second-degree robbery count, however, is irrelevant to conviction on the fourth-degree grand larceny count, a crime that does not require the use of force (Penal Law § 155.30). Whether Toral entertained any suspicion about the source of the goods being offered for sale is likewise irrelevant to defendant's guilt. Finally, it was hardly unreasonable for Toral to forego reporting the crime for an hour and a half so that he could supply the police with defendant's address.

We reject defendant's contention that the lineup identification should be suppressed. At the time he was placed

in a lineup and identified by Toral, defendant was in lawful custody in connection with a similar theft. The victim of that crime recognized defendant as he walked along the street and pointed him out to a police officer who pursued defendant and placed him under arrest. Although the arresting officer was not called to testify, sufficient information to conclude that there was probable cause for the arrest was introduced through the testimony of the detective investigating the instant matter (*People v Parris*, 83 NY2d 342, 346 [1994]; *see also People v Ketcham*, 93 NY2d 416, 420-21 [1999]). Since defendant was in lawful custody for one crime, he could be placed in a lineup in connection with another (*People v Whitaker*, 64 NY2d 347 [1985], *cert denied* 474 US 830 [1985]; *People v Crawford*, 221 AD2d 462 [1995], *lv denied* 87 NY2d 920 [1996]).

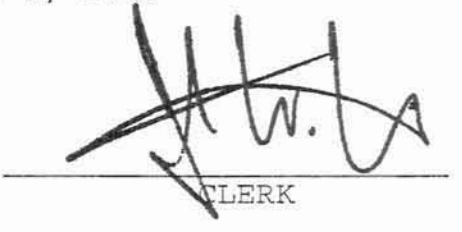
We also reject defendant's contention that the trial court should have charged petit larceny as a lesser included offense of grand larceny. While defendant is correct that the crime of grand larceny cannot be committed without also committing the lesser offense (*Matter of Eric R.*, 213 AD2d 310, 311-12 [1995]), viewing the evidence in the light most favorable to defendant (*People v Martin*, 59 NY2d 704, 705 [1983]), it affords no reasonable basis to warrant instructing the jury on petit larceny (CPL 300.50[1], [2]; *People v Glover*, 57 NY2d 61, 63 [1982]). Toral's testimony that $2,200 was taken from his person is

unimpeached, and there is simply no evidence that the amount involved was less than $1,000 so as to warrant an instruction on the lesser crime. Nor can defendant complain that the evidence of the amount involved in the sham transaction was insufficient. When the prosecutor attempted to elicit testimony of the amount withdrawn by the victim from an ATM machine, the court sustained the objection interposed by defendant, characterizing this line of inquiry as irrelevant.

We have considered defendant's remaining contentions and find them unavailing. There is no basis for reversal of either conviction predicated on defendant's guilty plea.

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

ENTERED: APRIL 8, 2008



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Lippman, P.J., Friedman, Catterson, Moskowitz, JJ.

3311 The People of the State of New York, Respondent,

Ind. 5329/05

-against-

Tony Winston,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered March 22, 2006, convicting defendant, after a jury trial, of three counts of robbery in the second degree, and sentencing him, as a second violent felony offender, to concurrent terms of 15 years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). Defendant's arguments are similar to arguments this Court has already rejected on a codefendant's appeal (*People v Winkfield*, 44 AD3d 499 [2007], *lv denied* 9 NY3d 1040 [2008]).

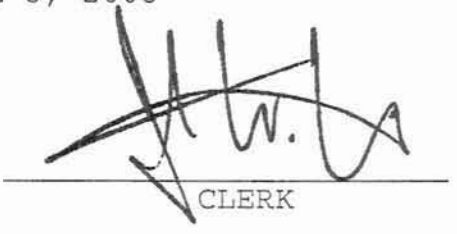
The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Walker*, 83 NY2d 455, 458-459 [1994]).

The probative value of defendant's criminal history on the issue of credibility outweighed its prejudicial effect. The court's limitations on the prosecutor's inquiry were appropriate when viewed in light of the extent of defendant's criminal record.

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 8, 2008



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Lippman, P.J., Friedman, Catterson, Moskowitz, JJ.

3312 Aida Gonzalez-Jarrin, et al., Index 22867/04
Plaintiffs-Respondents,

-against-

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

Lester Schwab Katz & Dwyer, LLP, New York (Paul M. Tarr of counsel), for appellants.

Rosenberg, Minc, Falkoff & Wolff, LLP, New York (Arthur O. Tisi of counsel), for respondents.

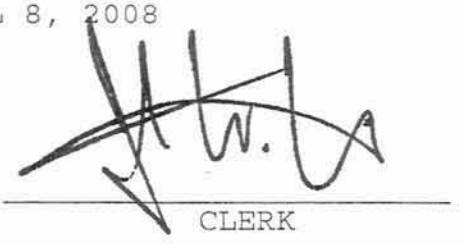
Order, Supreme Court, Bronx County (Lucy Billings, J.), entered on or about December 4, 2007, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in defendants' favor dismissing the complaint.

Defendants established prima facie their entitlement to judgment as a matter of law by demonstrating that at the time of plaintiff's accident it had been raining or snowing for several hours, that they had placed a mat on the vestibule floor, and that they had neither actual nor constructive notice of the particular wet condition that allegedly caused plaintiff to slip (*see Garcia v Delgado Travel Agency*, 4 AD3d 204 [2004]). Defendants were under no obligation "to cover the entire floor with mats and to continuously mop up all tracked-in water" (*id.*).

In opposition, plaintiffs failed to raise a triable issue of fact as to notice (*see id.*).

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

ENTERED: APRIL 8, 2008



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Lippman, P.J., Friedman, Catterson, Moskowitz, JJ.

3313 Anna Hangartner-Schuchmann, Index 316509/00
Plaintiff-Respondent-Appellant,

-against-

Philipp P. Hangartner,
Defendant-Appellant-Respondent.

DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, White Plains (Evan Wiederkehr of counsel), for appellant-respondent.

Fuchs & Eichen, LLP, White Plains (Linda A. Eichen of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Saralee Evans, J.), entered April 21, 2006, which, insofar as appealed from as limited by the briefs, denied defendant's motion seeking a modification of the visitation schedule set forth in the parties' separation agreement, and denied plaintiff's cross motion seeking reimbursement for tutoring expenses for the couple's child, and for attorney's fees, unanimously affirmed, without costs.

Defendant failed to show the existence of a material change of circumstances to warrant a modification of the separation agreement's child visitation provisions (*see Skidelsky v Skidelsky*, 279 AD2d 356 [2001]; *Lewin v Frances*, 270 AD2d 89 [2000]), or that the modification he proposes would be in the child's best interests at this time (*see Steck v Steck*, 307 AD2d 819 [2003]).

Plaintiff is not entitled to recover a portion of the child's tutoring fees, which she unilaterally decided to incur, since the settlement agreement provides that educational decisions must be made jointly after consultation between both parties (*see Matter of Aiken v Aiken*, 115 AD2d 919, 921 [1985]). Furthermore, the record fails to establish that defendant willfully withheld payment for child-related expenses from plaintiff, and accordingly, plaintiff's request for attorney's fees was appropriately denied (*compare Cion v Cion*, 253 AD2d 595, 596 [1998]).

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

ENTERED: APRIL 8, 2008

CLERK

Lippman, P.J., Friedman, Catterson, Moskowitz, JJ.

3314 The People of the State of New York, Ind. 61578C/04
Respondent,

-against-

Luis Ortiz,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Cynthia A. Carlson of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Seth L. Marvin, J.), rendered March 13, 2006, convicting defendant, after a jury trial, of burglary in the first degree, assault in the second degree, and attempted robbery in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 15 years, unanimously affirmed.

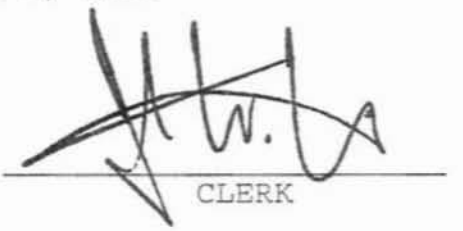
The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility and identification. Defendant was identified by the victim, who was acquainted with defendant and knew him by name. In addition, police officers saw defendant escaping from the victim's apartment and also made prompt, on-the-scene identifications. The inconsistencies in testimony cited by

defendant were insignificant.

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 8, 2008



CLERK

Lippman, P.J., Friedman, Catterson, Moskowitz, JJ.

3315 The People of the State of New York, Respondent, Ind. 4795/05

-against-

Tydell Tribble, Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Joseph Fisch, J.), rendered on or about June 8, 2006, 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: APRIL 8, 2008

CLERK

Lippman, P.J., Friedman, Catterson, Moskowitz, JJ.

3316 Marisela Peña, Index 350422/04
Plaintiff-Appellant,

-against-

Victor Alves,
Defendant-Respondent.

Marisela Peña, appellant pro se.

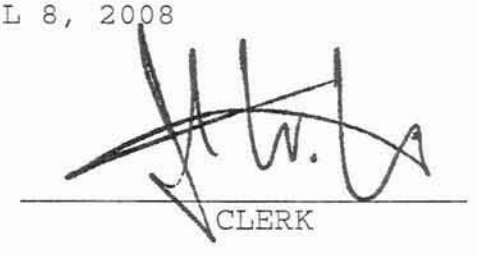
Judgment, Supreme Court, New York County (Saralee Evans, J.), entered February 7, 2007, inter alia, distributing the parties' marital property and awarding plaintiff child support commencing September 1, 2006, unanimously affirmed, without costs.

The trial court correctly found the severance pay plaintiff received after commencement of the action to be a form of deferred compensation earned during the marriage, not, as plaintiff argues, compensation for future lost earnings, and thus a distributable marital asset (*see Dunnan v Dunnan*, 261 AD2d 195, 196 [1999], *lv denied* 93 NY3d 816 [1999]). The court also properly rejected plaintiff's claim that the severance pay should, in effect, be exempt from distribution since she had already invested it in an educational trust for the parties' three children. Marital property cannot be shielded from equitable distribution in this way. The record does not show that plaintiff sought child support retroactive to the date she

lost her job at the end of 2004, and we note that the court did take plaintiff's financial difficulties during her period of unemployment into account by subtracting her living and relocation expenses incurred during this period from the total of marital property. To the extent plaintiff seeks to offset her initial equitable distribution installment payment against the amount of defendant's alleged arrears of child support, such relief should be sought, in the first instance, from the trial court. We have considered plaintiff's other arguments, including that the award of 30% of the marital property to defendant was inequitable, and find them unavailing. Defendant's purported cross appeal is not properly before this Court. Were we to consider his claim for maintenance, we would reject it.

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

ENTERED: APRIL 8, 2008



CLERK

Lippman, P.J., Friedman, Catterson, Moskowitz, JJ.

3319 Michael Sparber, Index 602861/03
Plaintiff,

Arlyne Roer, as personal representative of the Estate of Natalie Sparber,
Plaintiff-Appellant,

-against-

Manufacturer's Life Insurance Company (U.S.A.), et al.,
Defendants-Respondents.

Law Office of Erica Doran, Syosset (Erica Doran of counsel), for appellant.

Kelley Drye & Warren LLP, New York (Philip D. Robben of counsel), for Manufacturers Life Insurance Company (U.S.A.), respondent.

Winget, Spadafora & Schwartzberg, LLP, New York (Steven E. Mellen of counsel), for Robert W. Baird & Co., Inc. and Gerald A. Klingman, respondents.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered February 7, 2007, which granted defendants' motions to dismiss the amended complaint, unanimously affirmed, with costs.

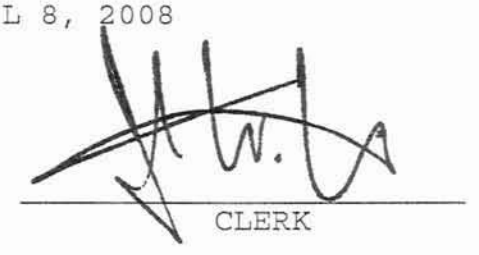
Plaintiff alleges that defendants insurance company, insurance brokerage company and insurance broker misrepresented to her decedent that the premiums on the subject insurance policy on the decedent's life, purchased in December 1989 and naming plaintiff and her sister as owner, would remain fixed throughout the decedent's life, and that the falsity of this representation

first became known to the decedent as a result of a November 2002 notice of an increase in the premium, some 10 months before the decedent's commencement of the action in September 2003. Defendants argue that the action is barred by a 1998 class action judgment entered in a California federal district court action. Plaintiff responds that the class action involved only vanishing premium policies, i.e., policies with a fixed number of premium payments or fixed amount of premium, not policies like the one at issue here with lifetime fixed premiums, and that the action, therefore, is not barred under California's applicable "primary right" approach to res judicata (*see Mycogen Corp. v Monsanto Co.*, 28 Cal 4th 888, 904 [2002]; *Citizens for Open Access to Sand & Tide, Inc. v Seadrift Assn.*, 60 Cal App 4th 1053, 1065, 1067 [1st Dist 1998]). The argument lacks merit, regardless of whether the applicable law of res judicata is that of California, the federal courts (*see Federated Dept. Stores, Inc. v Moitie*, 452 US 394, 398 [1981]) or New York (*see O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). The class action complaint sought redress for, inter alia, representations "that the Policies would provide . . . benefits . . . based on premium payments of a specified amount for the life of the insured." That allegation could only apply to policies, like plaintiff's, with premiums to be paid for the policy's life. In any event, as the motion court alternatively ruled, plaintiff's claims are

time-barred. In the latter regard we would comment only that plaintiff's argument that the policy set forth only three conditions under which premiums could be raised is based on policy terms concerning the "Minimum Premium schedule" applicable only to the first three years of the policy. Other parts of the policy gave clear notice that it had a "Flexible Premium" that could, inter alia, increase with the age of the insured. As the action clearly lacks merit, plaintiff's request for leave to replead was properly denied (*see Davis & Davis v Morson*, 286 AD2d 584, 585 [2001]). We have considered plaintiff's other arguments and find them unavailing.

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

ENTERED: APRIL 8, 2008



CLERK

Lippman, P.J., Friedman, Catterson, Moskowitz, JJ.

3321 The People of the State of New York, Respondent,

Ind. 5228/03

-against-

George Ramadhan,
Defendant-Appellant.

The Law Office of Stephen C. Jackson, New York (Stephen C. Jackson of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Jung Park of counsel), for respondent.

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered June 3, 2004, convicting defendant, after a jury trial, of burglary in the second degree, and sentencing him to a term of 8 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to a term of 4 years, and otherwise affirmed.

The court properly responded to a note from the deliberating jury by defining the crime of coercion and informing the jury that if defendant entered the premises in question with intent to commit that crime, this would satisfy the element of intent to commit a crime under second-degree burglary. The People did not limit their theory of the case to any particular intended crime (*compare People v Barnes*, 50 NY2d 375, 379 n 3 [1980]). The fact that, in summation, the prosecutor suggested assault and unlawful imprisonment as possible intended crimes did not constitute a

limitation on the theory of prosecution (*see People v Bess*, 107 AD2d 844, 846 [1985]). Furthermore, the supplemental charge was fully consistent with the trial evidence.

The court properly permitted the People to introduce evidence of threats received during trial by two of the witnesses, since there was sufficient circumstantial evidence to connect the threatening conduct to defendant and to warrant an inference as to his consciousness of guilt (*see People v Bonnemere*, 308 AD2d 418 [2003], *lv denied* 1 NY3d 568 [2003]). The court provided an extensive limiting instruction, which the jury is presumed to have followed.

We find the sentence excessive to the extent indicated.

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

ENTERED: APRIL 8, 2008

CLERK

Lippman, P.J., Friedman, Catterson, Moskowitz, JJ.

3323 Esther Rodriguez, Public Administrator of Bronx County, as Administratrix of the Estate of Roland Harris, deceased,
Plaintiff-Appellant,

Eric Carney, et al.,
Plaintiffs,

-against-

American Impex Corp., et al.,
Defendants,

Eric Carney, et al.,
Defendants-Respondents.

Index 27597/02

Brian J. Isaac, New York, for appellant.

Law Office of Max W. Gershweir, New York (Jennifer B. Ettenger of counsel), for respondents.

Order, Supreme Court, Bronx County (Edgar J. Walker, J.), entered on or about January 24, 2007, which granted defendant Carney's motion for summary judgment dismissing all claims against him, unanimously affirmed, without costs.

Decedent Harris died from injuries sustained after the collapse of a parapet wall of a Bronx building owned by defendant America Impex. Carney leased space in the storefront of this building where he operated a barbershop. Decedent was an independent contractor who worked in the shop at a chair he rented from Carney on a weekly basis, and had just exited the shop when the wall collapsed on him.

The collapsing wall was not part of the leased premises.

The accident occurred on the public sidewalk in front of Carney's barbershop, and plaintiff did not allege that Carney caused, created or contributed to the dangerous condition resulting in the accident.

Plaintiff also failed to raise a triable issue of fact as to whether Carney breached a duty of providing the public with a reasonably safe premises, including a safe means of ingress and egress. In its communications with Carney, by letter and otherwise, the building's owner never directed or suggested that Carney vacate the premises or close his shop during repairs that were about to be made to the building. The record does not indicate that Carney knew the extent of the damage to the parapet wall, or that it was in imminent danger of collapse. Under the circumstances, Carney, the business owner and lessee of the storefront premises, did not act unreasonably.

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

ENTERED: APRIL 8, 2008

CLERK

Lippman, P.J., Friedman, Catterson, Moskowitz, JJ.

3324 Fire & Casualty Insurance Company of Connecticut, Plaintiff-Respondent, Index 604209/04

-against-

Victor Solomon, et al., Defendants-Appellants,

Juliana Kelly, et al., Defendants.

Diamond and Diamond LLC, New York (Stuart Diamond of counsel), for appellants.

Schindel, Farman, Lipsius, Gardner & Rabinovich LLP, New York (David BenHaim of counsel), for respondent.

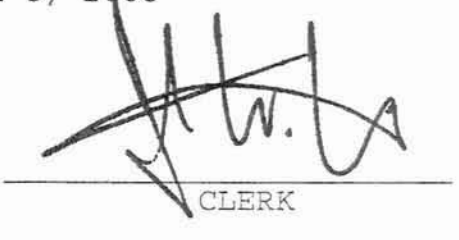
Order and judgment (one paper), Supreme Court, New York County (Shirley Werner Kornreich, J.), entered August 22, 2007, granting plaintiff insurer's motion for summary judgment and declaring in its favor that it is not obligated to defend or indemnify defendants-appellants property owner and management company in an underlying action for lead paint injuries, unanimously affirmed, without costs.

Plaintiff satisfied its initial burden on the motion with evidence adduced in disclosure proceedings in the underlying action demonstrating that the infants' lead injuries were sustained before the subject policy went into effect. Such evidence includes the mother's deposition testimony that there were no problems with paint in the apartment following abatement;

the subject policy showing commencement of coverage on December 10, 2002; a letter dated December 12, 2002 from the Department of Health to appellants stating that based on an inspection conducted on July 22, 2002, the lead condition in the apartment had been corrected; and medical records showing that on January 29, 2003, one child's lead level was normal and the other child's level only very slightly elevated at 11 (the parties agree that 10 and under is normal; 10-19 is moderate; 20-44 is high; and 45-69 is urgent). We reject appellants' argument that this January 2003 reading of 11 raises an issue of fact as to whether the child was still being exposed to lead in the apartment after the policy went into effect in December 2002, and that plaintiff's motion papers should have included a medical expert's affidavit explaining why the child's level had not dropped down into an undeniably normal range. As the motion court emphasized, there is no evidence that any lead ingestion could have occurred in the apartment after the July 2002 inspection, and appellants' suggestion to the contrary is mere speculation. We have considered appellants' other arguments and find them unavailing.

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

ENTERED: APRIL 8, 2008



CLERK

Lippman, P.J., Friedman, Catterson, Moskowitz, JJ.

3325N Slazer Enterprises Owner, LLC, Index 101561/06
Petitioner-Appellant,

-against-

Gotham Greenwich Construction Company, LLC,
Respondent-Respondent.

Peckar & Abramson, P.C., New York (David Fultz of counsel), for appellant.

Rivelis, Pawa & Blum, LLP, New York (Howard Blum of counsel), for respondent.

Order, Supreme Court, New York County (Leland DeGrasse, J.), entered July 2, 2007, which denied petitioner owner's application pursuant to Lien Law § 19(6) to summarily discharge respondent construction manager's mechanic's lien, and dismissed the petition, unanimously affirmed, without costs.

The court properly refused to consider respondent's itemized statement demanded by petitioner pursuant to Lien Law § 38, and correctly dismissed the petition on the ground that the subject mechanic's lien is facially valid. In the absence of a defect on the face of the notice of lien, the disputes concerning whether the insurance allegedly procured by respondent is a lienable item, and whether other items constituting the lien have been

paid, must await trial of the foreclosure action (*see Pontos Renovation v Kitano Arms Corp.*, 204 AD2d 87 [1994]).

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

ENTERED: APRIL 8, 2008

CLERK

Lippman, P.J., Friedman, Catterson, Moskowitz, JJ.

3326N Shameika Henderson, Index 21308/03
Plaintiff-Respondent,

-against-

Eliezer Shadmi,
Defendant-Appellant,

"John Doe," etc.
Defendant.

McMahon, Martine & Gallagher, New York (Patrick W. Brophy of counsel), for appellant.

Jacob Oresky & Associates, PLLC, Bronx (Ava L. Zelenetsky of counsel), for respondent.

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered December 28, 2006, which granted plaintiff's motion to strike defendant's answer to the extent of striking the answer unless defendant appeared for a deposition within 90 days from the date of the order, unanimously reversed, on the facts, without costs, to grant the motion to the extent of precluding defendant from offering evidence at trial on the issue of liability.

There was an insufficient showing of a good faith effort to locate defendant after the court orders requiring that he be

produced for a deposition were issued. In these circumstances, we find the more appropriate sanction to be unconditional preclusion.

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

ENTERED: APRIL 8, 2008

CLERK

Lippman, P.J., Friedman, Catterson, Moskowitz, JJ.

3327N On Assignment, Plaintiff-Respondent, Index 111371/05

-against-

Medasorb Technologies, LLC, formerly known as Renaltech International, LLC, Defendant-Appellant.

Sanders Ortoli Vaughn-Flam & Rosenstadt, LLP, New York (Eric Vaughn-Flam and Gena Zaiderman of counsel), for appellant.

Maidenbaum & Associates, PLLC, New York (Carol G. Morokoff of counsel), for respondent.

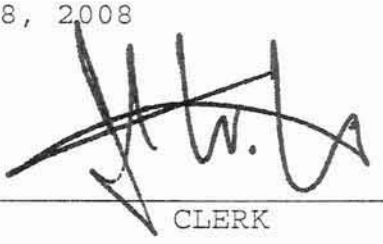
Order, Supreme Court, New York County (Leland DeGrasse, J.), entered December 29, 2006, which denied defendant's motion to vacate its default judgment, unanimously affirmed, with costs.

A party seeking to vacate a default judgment under CPLR 5015(a)(1) must demonstrate both a reasonable excuse for the default and a meritorious cause of action (*Abate v Long*, 261 AD2d 252 [1999]). Failure to file a change of address with the Secretary of State is generally not a reasonable excuse for such vacatur of a default judgment under CPLR 5015(a)(1) (*Crespo v A.D.A. Mgt.*, 292 AD2d 5 [2002]; Limited Liability Company Law § 301(e) and 303). While such a failure does not constitute a per se barrier to vacatur, and some flexibility may be allowed by the courts (*Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 143, [1986]), flexibility is not warranted in this instance,

given the passage of 15 months during which defendant's address on file with the Secretary of State was not updated. Moreover, defendant failed to establish a meritorious defense to the claim of an account stated (*see Morrison Cohen Singer & Weinstein, LLP v Waters*, 13 AD3d 51 [2004]; *Merrill/New York Co. v Celerity Sys.*, 300 AD2d 206 [2002]), and never properly pleaded a defense that he had paid the debt, either fully or partially (*see CIT Group/Factoring Mfrs. Hanover v Supermarkets Gen. Corp.*, 183 AD2d 454, 455 [1992]).

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

ENTERED: APRIL 8, 2008



CLERK

Mazzarelli, J.P., Saxe, Friedman, Nardelli, JJ.

3042-
3042A Jonathan Marte, et al., Index 103207/96
Plaintiffs-Appellants,

-against-

1090 University Avenue, LLC,
Defendant-Respondent,

Esther Rogers, Executrix of the
Estate of Fritz Kissler, et al.,
Defendants.

Fitzgerald & Fitzgerald, P.C., Yonkers (John M. Daly of counsel), for appellants.

Charles N. Rock, PLLC, Newburgh (Carolyn Ann Campbell of counsel), for respondents.

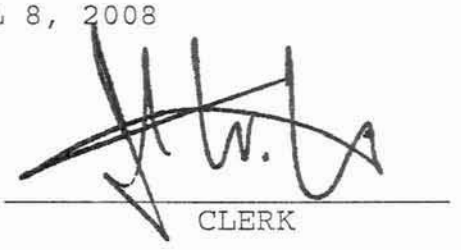
Judgment, Supreme Court, New York County (Jane S. Solomon, J.), entered March 30, 2006, dismissing the complaint, and bringing up for review an order, same court and Justice, entered February 7, 2006, which granted defendant 1090 University Avenue's cross motion for summary judgment, unanimously affirmed, without costs. Appeal from the aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The infant plaintiffs moved into the subject apartment in July 1994. On March 17, 1995, the New York City Department of Health issued an abatement order identifying one area in the apartment as having lead in excessive levels. It is uncontested that the lead was immediately abated. The current landlord of

the building in question, defendant 1090 University Avenue, acquired the property on March 23, 1995. On May 10, 1995, the Department of Health issued a report confirming that the violation had been corrected. No subsequent lead paint violations were issued, and plaintiffs have failed to present evidence sufficient to raise a triable issue of fact concerning their allegation that the abatement order did not identify all areas in the apartment containing lead paint in unlawful levels. Accordingly, the court properly found that 1090 University Avenue, as a matter of law, acted reasonably under the circumstances and discharged its duty of care (*see Juarez v Wavecrest Mgt. Team,* 88 NY2d 628, 644 [1996]).

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

ENTERED: APRIL 8, 2008



CLERK

Tom, J.P., Saxe, Nardelli, Williams, JJ.

3288 The People of the State of New York, Ind. 2478/05
Respondent,

-against-

Eric Bailey,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered March 24, 2006, convicting defendant, after a jury trial, of criminal possession of a forged instrument in the first degree and two counts of attempted grand larceny in the fourth degree, and sentencing him to an aggregate term of 1½ to 4½ years, unanimously affirmed.

We reject defendant's challenges to the sufficiency and weight of the evidence supporting the "intent to defraud, deceive, or injure another" element (Penal Law § 170.30) of his forged instrument conviction (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The totality of the evidence, including defendant's statement to the police evincing a consciousness of guilt, and the lack of any reason for defendant to be carrying counterfeit bills in a shopping district other than to pass them, supported the inference that he possessed the bills with the

requisite intent (*see People v Dallas*, 46 AD3d 489, 491 [2007]).

The court properly denied defendant's motion to suppress the statement he volunteered to the police prior to receiving *Miranda* warnings. During routine arrest processing and vouchering of property, two officers conversed with each other, within earshot of defendant, about the fact that the bills recovered from his pocket were counterfeit. This did not constitute the functional equivalent of interrogation, and defendant's spontaneous response was therefore not subject to suppression (*People v Atkins*, 273 AD2d 12, 13 [2000], *lv denied* 95 NY2d 960 [2000]).

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Walker*, 83 NY2d 455, 458-459 [1994]). Defendant's prior convictions were highly probative of his credibility, and the court minimized their prejudicial effect by precluding elicitation of their underlying facts.

Defendant's challenge to the jury charge is unpreserved and we decline to review it in the interest of justice.

M-864 *People v Eric Bailey*

Motion seeking leave to enlarge record granted only to the extent of enlarging record to include the transcript of October 31, 2005 and otherwise denied.

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

ENTERED: APRIL 8, 2008

CLERK

Tom, J.P., Saxe, Nardelli, Williams, JJ.

3289 Ronald Riley, Index 8629/04
Plaintiff-Appellant,

-against-

City of New York,
Defendant,

Nor-Court Management, Inc., et al.,
Defendants-Respondents.

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph of counsel) for appellant.

Rivkin Radler LLP, Uniondale (Harris J. Zakarin of counsel), for respondents.

Judgment, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered November 16, 2006, dismissing the complaint, unanimously affirmed, without costs.

Plaintiff tripped over the top edge of a cellar door that was slightly elevated above the sidewalk, and his own deposition testimony established that the accident occurred in daylight in an area that he traveled on a daily basis. Defendants' motion established prima facie entitlement to summary judgment on the ground that the alleged defect was trivial, did not constitute a trap or nuisance, and was not actionable as a matter of law

(*see Trincere v County of Suffolk*, 90 NY2d 976 [1997]; *Martin v Lafayette Morrison Hous. Corp.*, 31 AD3d 300 [2006]). Plaintiff failed to raise a material issue of fact in opposition.

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

ENTERED: APRIL 8, 2008

CLERK

Tom, J.P., Saxe, Nardelli, Williams, JJ.

3290-
3291 In re Hector D.,

A Person Alleged to be
a Juvenile Delinquent.
Appellant.

- - - - -

Presentment Agency

Tamara A. Steckler, The Legal Aid Society, New York (Patricia S. Colella of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Alma Cordova, J.), entered on or about June 16, 2006, 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 criminal possession of marijuana in the fifth degree, and placed him on probation for 18 months, upon the condition that he reside at the Graham School Residential Treatment Center, unanimously affirmed, without costs. Appeal from order, same court and Judge, entered on or about May 9, 2007, unanimously dismissed as abandoned, without costs.

The court properly denied appellant's suppression motion.

There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). The evidence establishes a lawful arrest based on the officer's observation of marijuana in plain view.

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

ENTERED: APRIL 8, 2008

CLERK

Tom, J.P., Saxe, Nardelli, Williams, JJ.

3292-
3293-
3294 Lisa A. Serradilla, et al., Index 604328/01
Plaintiffs-Respondents,

-against-

Lords Corporation, et al.,
Defendants,

Ronald Vargo, et al.,
Defendants-Appellants.

John Thomas Roesch, East Meadow, for Ronald Vargo, appellant.

Michael A. Cardozo, Corporation Counsel, New York (Jane L. Gordon of counsel), for The City of New York, appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York (Richard E. Lerner of counsel), for Nathan Barotz, appellant.

Law Offices of Victor A. Worms, P.C., New York (Victor A. Worms of counsel), for respondents.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about February 27, 2007, which denied defendants-appellants' motions for summary judgment dismissing the complaint as against them, unanimously modified, on the law, to dismiss plaintiff's first three causes of action as against defendant City of New York, and otherwise affirmed, without costs.

Plaintiffs allege that they purchased a single room occupancy multiple dwelling for the purpose of renovating it and occupying it as single-family home, but were unable to commence

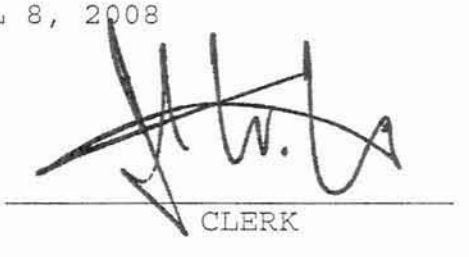
the renovation because a vacate order issued before they took title had not been cured, precluding issuance of the certificate of no harassment that was needed to obtain a building permit (*see* Administrative Code of City of N.Y. § 27-198). Plaintiffs further allege that they were unaware of the existence of the vacate order, or of the need for a certificate of no harassment, due to the negligence of defendants-appellants -- the attorney who represented plaintiffs at the closing, the architect who prepared the renovation plans and submitted them to the City's Department of Buildings, and the City of New York whose Department of Housing Preservation and Development (HPD) issued the vacate order and is the agency authorized to issue certificates of no harassment. Plaintiffs' first cause of action as against the City for negligence should be dismissed for lack of evidence that the City owed plaintiffs, as opposed to the general public, a duty to serve, file or publish the vacate order (*see Lauer v City of New York*, 95 NY2d 95, 100-101 [2000]). Plaintiffs were not the record owners of the building at the time the vacate order was issued, and the record establishes that the City complied with the procedures in place at that time. Nor do plaintiffs adduce evidence that HPD assumed an affirmative duty to act on their behalf, or that HPD's agents knew that inaction would harm them, such as might raise an issue of fact as to whether the City owed plaintiffs a duty to serve, file and

publish the vacate order based on a "special relationship" (*see id.* at 102). Plaintiffs' second cause of action for illegal denial of the building permit should be dismissed because the City's decision whether to issue a permit is discretionary, and thus immune from lawsuits (*see City of New York v 17 Vista Assoc.*, 84 NY2d 299, 307 [1994]). While the City raised this issue for the first time on appeal, "there is a sufficient record on appeal and the issue is determinative" (*Matter of Allstate Ins. Co. v Perez*, 157 AD2d 521, 523 [1990]). Plaintiff's third cause of action for "financial hardship" should be dismissed as derivative of the first two causes of action. The City's challenges to plaintiffs' fifth and sixth causes of action for denial of due process and regulatory taking of property, as moot and/or premature, were improperly raised for the first time in the City's reply papers, and we decline to consider them (*see Dannasch v Bifulco*, 184 AD2d 415, 416-417 [1992]). We note the absence of argument on plaintiffs' fourth cause of action. Concerning plaintiffs' cause of action against the architect for professional malpractice alleging, inter alia, his failure to obtain a certificate of no harassment, issues of fact exist, including when the architect's professional relationship with

plaintiffs ended, and thus whether the complaint as against him is time-barred under CPLR 214(6) (*see N.R.S. Constr. Corp. v Board of Educ., Cent. School Dist. No. 2, Town of Yorktown, New Castle & Cortlandt*, 82 AD2d 876 [1981]). Such issue is raised by documentary evidence tending to show that the architect was retained not just to draft construction plans but also to obtain Building Department permits and approvals (*see Matter of Kohn Pederson Fox Assoc. [FDIC]*, 189 AD2d 557, 558 [1993]). Concerning the cause of action against the attorney for legal malpractice alleging, inter alia, his failure to advise plaintiffs of the need for a certificate of no harassment, the attorney failed to meet his initial burden of coming forward with evidence establishing, inter alia, that his only obligation to plaintiffs was to ensure that marketable title was transferred at closing and that the requisite standard of care did not require that he advise plaintiffs, prior to closing, of the need for a certificate of no harassment (*see Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo*, 259 AD2d 282, 283-284 [1999]).

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

ENTERED: APRIL 8, 2008



CLERK

Tom, J.P., Saxe, Nardelli, Williams, JJ.

3295 The People of the State of New York, Ind. 4732/05
Respondent,

-against-

Sidney Purdie,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Adrienne Gantt of counsel), and Proskauer Rose LLP, New York (Karen D. Coombs of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered June 1, 2006, convicting defendant, after a jury trial, of burglary in the second degree and criminal trespass in the second degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 20 years to life, unanimously affirmed.

The court properly denied defendant's motion to suppress identification testimony. The circumstances of the showup identification, made in close proximity to the time and place of the crime and as part of an unbroken chain of events, were not unduly suggestive (*see People v Brisco*, 99 NY2d 596 [2003]; *People v Gatling*, 38 AD3d 239, 240 [2007], *lv denied* 9 NY3d 865 [2007]). Defendant's argument that the use of a showup was rendered improper by the fact that the police already had probable cause to arrest is unpreserved and we decline to review

it in the interest of justice. As an alternative holding, we also reject it on the merits (*see People v Duuvon*, 77 NY2d 541, 545, [1991]; *People v Santiago*, 235 AD2d 229 [1997], *lv denied* 89 NY2d 1040 [1997]).

The court's jury instruction on the permissible inference arising from recent, exclusive possession of stolen property in the absence of a "believable innocent explanation" correctly stated the law (*see People v Galbo*, 218 NY 283, 290 [1916]), and the court properly denied defendant's request that it omit the word "believable." Defendant's unelaborated request did not preserve his present claim that the use of that word shifted the burden of proof. Furthermore, to the extent defendant is arguing that when the court repeated this instruction in response to a note from the deliberating jury it was obligated to accompany it with a reminder as to the burden of proof, that claim is likewise unpreserved. We decline to review these latter claims in the interest of justice. As an alternative holding, we also reject them on the merits. Neither the main nor the supplemental charge could have given the jury the impression that it was defendant's

burden to establish a believable innocent explanation (*see Barnes v United States*, 412 US 837, 846-847 [1973]; *People v Moro*, 23 NY2d 496, 501-502 [1969]).

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

ENTERED: APRIL 8, 2008

Tom, J.P., Saxe, Nardelli, Williams, JJ.

3296-
3296A In re Michelle F.F.,
Petitioner-Respondent,

-against-

Edward J.F., Jr.,
Respondent-Appellant.

Dora M. Lassinger, East Rockaway, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for respondent.

Order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about June 14, 2006, which adjudged respondent father in willful violation of a March 25, 1996 order, and committed him to the New York City Department of Corrections for weekends between June 16 and December 16, 2006, unanimously affirmed, without costs. Order, same court and Judge, entered on or about August 2, 2006, which denied the father's objections to the May 8, 2006 order of the Support Magistrate, dismissing his petition for a downward modification of child support and adjustment of arrears, unanimously modified, on the facts, to grant the father's objections to the extent of decreasing arrears to $61,401, and otherwise affirmed, without costs.

Petitioner mother concedes that the amount of arrears fixed by the Support Magistrate ($79,286) erroneously included $17,885, which had previously been reduced to judgment in 1996.

Accordingly, we reduce the amount of arrears to the extent indicated.

The mother proved that the father willfully failed to obey a lawful order requiring him to pay $140 per week in child support. The arrears in this case, as adjusted above, date back to September 1995, and while the father presented evidence of his financial hardships after losing his job in May 2000, he presented no evidence that he paid child support in full for periods before May 2000, when he was working (*see Matter of Powers v Powers*, 86 NY2d 63, 69 [1995]; *Matter of Sheridan v Sheridan*, 70 AD2d 698 [1979], *lv dismissed* 48 NY2d 605 [1979]; Family Court Act § 454).

The father contends that the part of Family Court Act § 454(3)(a) that says, "failure to pay support, as ordered, shall constitute prima facie evidence of a willful violation" is unconstitutional because it shifts the burden of proof to the person who is in the position of a criminal defendant. We reach this argument even though the father's jail term has ended (*see Matter of Bickwid v Deutsch*, 87 NY2d 862, 863 [1995]; *Matter of Moore v Blank*, 8 AD3d 1090, 1091 [2004], *lv denied* 3 NY3d 606 [2004]), and where he failed to preserve the argument (*see Matter of Stagnar v Stagnar*, 98 AD2d 983, 984 [1983]). On the merits, the argument is unavailing, because the part of Family Court Act § 454(3)(a) challenged by the father merely shifts the burden of

going forward (*see Powers*, 86 NY2d at 69); and not the ultimate burden of proof (*see Matter of Porcelain v Porcelain*, 94 Misc 2d 891, 892-893 [1978]).

Contrary to the father's contention that he should not have been jailed because the mother did not show that he was capable of paying the amount in arrears, the subject order of commitment was not conditioned on the payment of arrears (*compare Matter of Nasser v Abraham*, 86 AD2d 973 [1982]).

Except as indicated above, Family Court providently exercised its discretion in denying the father's objections to the Support Magistrate's dismissal of his petition (*see Matter of Musumeci v Musumeci*, 295 AD2d 516 [2002]). While the father testified that he was unemployed during certain periods before and after the filing of his petition, "the determination to reduce support must be predicated on respondent's capacity to generate income, not on his current economic status" (*O'Brien v McCann*, 249 AD2d 92, 93 [1998]). The Support Magistrate was not obliged to accept the father's unsupported testimony that a medical condition prevented him from working full-time (*see Matter of Maria T. v Kwame A.*, 35 AD3d 239, 240 [2006]), and the mother was within her rights to object that the father's testimony about what a doctor concluded was hearsay (*see* Family Court Act § 439[d]). The Support Magistrate, who heard and saw

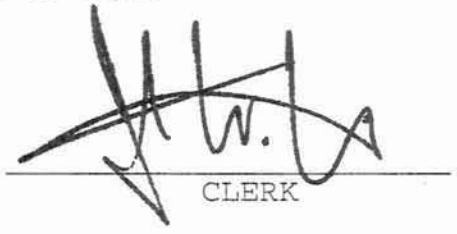
the father, was in the best position to evaluate his credibility (*see e.g. Moore*, 8 AD3d at 1091; *Matter of Reed v Reed*, 240 AD2d 951, 952 [1997]), and evidently did not believe that he was diligently searching for new employment commensurate with his qualifications and experience, which was the father's burden to show inasmuch as his petition for downward modification was largely based on his loss of a job (*see Matter of Cox v Cox*, 20 AD3d 527, 528 [2005]).

While the father should have been allowed to question the mother about her income (*see e.g. Manno v Manno*, 224 AD2d 395, 398 [1996]), this error was harmless because the father failed to establish that he was entitled to a downward modification. The Support Magistrate providently exercised his authority to control the proceedings before him when he concluded that questions about the father's educational background were unnecessary in light of a prior court finding that the father was an educated man. Furthermore, the father waived his argument that the Support Magistrate should not have required receipts signed by the parties' eldest son (through whom the father allegedly made child support payments) before he would allow the son to testify because when the Magistrate made this ruling, the father's lawyer acquiesced. Since the Magistrate's refusal to permit the son to testify was not connected with the father's jail sentence, normal

rules of preservation apply, and we decline to consider this unpreserved argument (*see e.g. Green v Green*, 288 AD2d 436, 437 [2001]; *Reed*, 240 AD2d at 952-953).

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

ENTERED: APRIL 8, 2008



CLERK

Tom, J.P., Saxe, Nardelli, Williams, JJ.

3297 Dawn Peters, as Administratrix of the Estate of Riccardo Gandolfo, Deceased, etc., Plaintiff-Respondent, Index 24817/99

-against-

Eli Goldner, M.D., et al., Defendants-Appellants,

Infu-Tech, Inc., Defendant-Respondent.

Leahey & Johnson, P.C., New York (Peter J. Johnson, Jr. of counsel), for Eli Goldner, M.D. and Eli Goldner, M.D., P.C., appellants.

Callan, Koster, Brady & Brennan, LLP, New York (Michael P. Kandler of counsel), for Ramaiyer Narayan, M.D., Ramaiyer Narayan, M.D., P.C., Rohan L. Wijetilaka, M.D. and Rohan L. Wijetilaka, M.D., P.C., appellants.

Rende, Ryan & Downes, LLP, White Plains (Roland T. Koke of counsel), for Yonkers General Hospital, appellant.

Silverson, Pareres & Lombardi, LLP, New York (Craig Kamback of counsel), for The New York Medical Group, P.C., appellant.

Goldsmith Richman & Harz LLP, New York (Christina Ctorides of counsel), for Dawn Peters, respondent.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Richard E. Lerner of counsel), for Infu-Tech, Inc., respondent.

Order, Supreme Court, Bronx County (Stanley Green, J.), entered January 19, 2007, which, to the extent appealed from, denied defendants-appellants' motions for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motions granted. The Clerk is

directed to enter judgment in favor of defendants-appellants dismissing the complaint as against them.

Defendant Dr. Goldner established prima facie that he appropriately responded to the decedent's clinical presentation throughout the time he served as primary care physician, appropriately referred the decedent for evaluation by a cardiologist in July 1996, appropriately evaluated the decedent's condition on April 20, 1998 and admitted him to the hospital for further evaluation and work-up, and appropriately discharged the decedent from the hospital after extensive work-up revealed only that the decedent was experiencing mild episodes of nonsustained ventricular tachycardia, which was appropriately treated with Betapace pending further studies, such as the cardiac catheterization/coronary angio/electrophysiological (EPS) study, which could not be performed during the decedent's hospitalization because of his endocarditis.

In opposition, plaintiffs failed to raise an issue of fact (*see Feliz v Beth Israel Med. Ctr.*, 38 AD3d 396 [2007]). Notably, their expert did not disagree that the decedent was properly diagnosed with endocarditis, that the treatment for endocarditis was proper, that the decedent had several episodes of nonsustained ventricular tachycardia while hospitalized but did not suffer any episodes of sustained ventricular tachycardia, and that Betapace was a proper medication to treat the arrhythmia

and was prescribed in a proper dosage. Nor did he criticize the decision to treat the decedent's endocarditis with intravenous antibiotics at home before performing cardiac catheterization EPS studies. The medical record shows that at the time the decedent was discharged, his nonsustained ventricular tachycardia was not life-threatening and was amenable to treatment on an outpatient basis; the decedent was hemodynamically stable and had consistently stable vital signs. Thus, while plaintiffs allege that the decedent's discharge from the hospital was premature, their expert did not challenge any of the factors on which the decision to discharge him was based. Plaintiffs' expert also failed to address the decedent's long history of an enlarged heart and mitral valve prolapse, his unilateral decision to stop taking Inderal after it had been prescribed, and his failure to follow up with Dr. Goldner as directed.

For similar reasons, plaintiffs failed to raise an issue of fact as to the liability of the cardiologists, defendants Dr. Narayan and Dr. Wijetilaka, on whose expertise Dr. Goldner appropriately relied in discharging the decedent from the hospital on May 1, 1998. The cardiologists established prima facie that they rendered appropriate treatment to the decedent during his hospitalization and that, at the time of discharge, he had no evidence of congestive heart failure or hemodynamic instability, that he had consistently stable vital signs, that

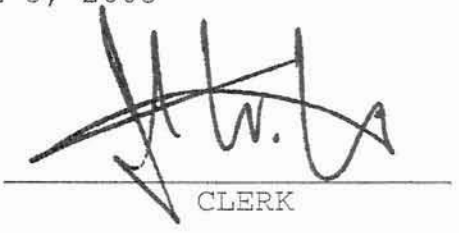
his mitral valve condition was not associated with symptoms of heart failure, that his nonsustained ventricular tachycardia was mild and asymptomatic, and that this condition did not require total suppression prior to discharge.

The only departure alleged against the cardiologists is that they concurred in the decision to discharge the decedent from the hospital in an allegedly unstable condition. However, as indicated, plaintiffs' expert did not challenge any of the factors on which the decision to discharge was based. Indeed, plaintiffs relied on the same affidavit in opposing the primary care physician's and the cardiologists' motions for summary judgment. Moreover, they made no attempt to distinguish among the individual doctors or to differentiate the alleged departures by each moving defendant (*see Kaplan v Hamilton Med. Assoc.*, 262 AD2d 609 [1999]).

In light of this disposition, the action must also be dismissed against defendant institutions, whose liability is alleged to be vicarious.

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

ENTERED: APRIL 8, 2008



CLERK

Tom, J.P., Gonzalez, Nardelli, Williams, JJ.

3298-
3299-
3300 Universal/MMEC, Ltd., Index 601052/03
Plaintiff-Appellant, 590322/07

Mezz Electric, Inc.,
Plaintiff,

-against-

The Dormitory Authority of the State of New York, et al.,
Defendants-Respondents.

[And a Third-Party Action]

McDonough Marcus Cohn Tretter Heller & Kanca, LLP, New Rochelle (Mark J. Sarro of counsel), for appellant.

Holland & Knight, LLP, New York (Timothy B. Froessel of counsel), for The Dormitory Authority of the State of New York, respondent.

Steven G. Rubin & Associates, P.C., Melville (Steven G. Rubin of counsel), for Siebe Environmental Controls and National Fire Insurance Company of Hartford, respondents.

Order, Supreme Court, New York County (Karla Moskowitz, J.), entered March 23, 2006, which, to the extent appealed from as limited by the briefs, granted the cross motion of defendants Mezz Electric and Guy Mezzancello and Joan Mezzancello for partial summary judgment dismissing plaintiff's claims for delay damages and for change order work performed without written authorization, and granted the cross motion of defendants Invensys Building Systems Inc., f/k/a Siebe Environmental Controls, a Division of Barber-Colman Company, and National Fire

Insurance Company of Hartford for partial summary judgment dismissing plaintiff's loss of labor productivity claim, unanimously affirmed, without costs.

Order, same court and Justice, entered on or about January 31, 2007, which, to the extent appealed from as limited by the briefs, upon reargument, adhered to the March 23, 2006 order insofar as it denied plaintiff's motion for partial summary judgment on certain change order work performed pursuant to written directives, unanimously affirmed, without costs.

Order, same court and Justice, entered on or about February 20, 2007, which, to the extent appealed from, granted plaintiff's motion to amend the complaint to include a cause of action for loss of productivity only to the extent such cause of action was not barred by prior orders, and struck the proposed cause of action for unjust enrichment from the proposed amended complaint, unanimously affirmed, without costs.

Plaintiff failed to establish a course of conduct that eliminated the contract provisions requiring change order work to be in writing (*see generally Barsotti's, Inc. v Consolidated Edison Co. of N.Y.*, 254 AD2d 211 [1998]).

Plaintiff's claims for loss of labor productivity due to inadequate hoists, excessive overtime work and working in an occupied building are precluded by the prime contract's

"no damages for delay" clause (*see Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297, 313-314 [1986]). Moreover, the contract specifically precludes claims based on the limited availability of hoists and specifically grants the owner the right to occupy the premises, or any part thereof, before the completion of construction. Since the surety bond was unambiguous in its incorporation of the terms of the contract, plaintiff cannot recover against the surety for claims prohibited by the contract (*see Dupack v Nationwide Leisure Corp.*, 73 AD2d 903, 905 [1980]; State Finance Law § 137).

Issues of fact exist whether plaintiff is owed anything on its claims for premium time and "Chiller Plant" work.

Plaintiff is precluded from recovery on a theory of unjust enrichment by the existence of the contract (*see Cornhusker Farms v Hunts Point Coop. Mkt.*, 2 AD3d 201, 206 [2003]).

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

M-5297 ***Universal/MMEC, Ltd., et al. v Dormitory Authority of the State of New York, et al.***

Motion seeking leave to reargue and for an extension of time to file an amended brief and for other related relief denied.

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

ENTERED: APRIL 8, 2008

CLERK

Tom, J.P., Saxe, Nardelli, Williams, JJ.

3301 The People of the State of New York, Ind. 2851/04
Respondent,

-against-

Carl Robert,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered on or about January 4, 2006 , 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: APRIL 8, 2008

CLERK

Tom, J.P., Saxe, Nardelli, Williams, JJ.

3302 Svetlana Starayeva, Index 304772/02
Plaintiff-Respondent,

-against-

Vyacheslav Starayev,
Defendant-Appellant.

Vyacheslav Starayev, appellant pro se.

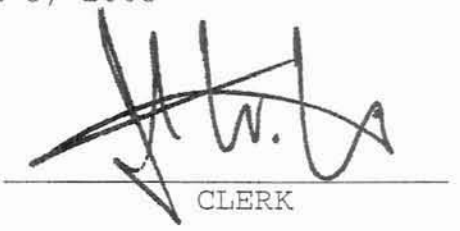
Order, Supreme Court, New York County (Laura Visitacion-Lewis, J.), entered June 25, 2007, which enforced the child support provision in a stipulation settling a divorce action, and calculated and directed defendant's payment of child support arrears, unanimously affirmed, without costs.

Defendant's alleged lack of understanding of English does not tend to show fraud or overreaching such as might warrant invalidating the stipulation (*see Matter of Sunshine*, 51 AD2d 326, 328 [1976], *affd* 40 NY2d 875 [1976]). Furthermore, defendant's pro se papers in both the motion court and this Court indicate that his English was strong enough to have grasped the fairly straightforward provisions of the stipulation in issue (*cf. Matter of Sarah K.*, 66 NY2d 223, 241 [1985], *cert denied sub nom. Kosher v Stamatis*, 475 US 1108 [1986] [one who signs a document is presumed to have understood and agreed to it]). Defendant did not cross-move for a downward modification (Domestic Relations Law § 244), and his challenges to the motion

court's finding as to the arrears lack support in the record.

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

ENTERED: APRIL 8, 2008



CLERK

Tom, J.P., Saxe, Nardelli, Williams, JJ.

3304 Michael Cotrone, Index 112057/01
Plaintiff-Appellant,

-against-

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

Lewis, Clifton & Nikolaidis, P.C., New York (Elaine Smith of counsel), for appellant.

Mary Schuette, New York (Richard A. Levin of counsel), for respondent.

Order, Supreme Court, New York County (Harold B. Beeler, J.), entered October 2, 2006, which, after a nonjury trial, rendered a verdict in defendant's favor and dismissed the complaint, unanimously affirmed, without costs.

It cannot be said that the verdict could not have been reached under any fair interpretation of the evidence (*see Claridge Gardens v Menotti*, 160 AD2d 544 [1990]). The provisions of Labor Law § 740 regarding retaliatory discharge are to be strictly construed (*see Noble v 93 Univ. Place Corp.*, 303 F Supp 2d 365, 373 [SD NY 2003]). Although leaving tanker trucks with hazardous materials unattended on a public street violated 49 CFR 397.5, this violation did not create a substantial and specific danger to the public health or safety. The claim that the violation would present such a risk was improperly based on mere

speculation (*see Nadkarni v North Shore-Long Is. Jewish Health Sys.*, 21 AD3d 354 [2005]). The statute "envisions a certain quantum of dangerous activity before its remedies are implicated" (*Peace v KRNH, Inc.*, 12 AD3d 914, 915 [2004], *lv denied* 4 NY3d 705 [2005]). Plaintiff pointed to two isolated incidents where these trucks had been left unattended for a short period of time, in the presence of other employees who concededly did not have tanker truck driver training. Aside from the fact that these incidents led to no adverse consequence, they did not rise to the level of dangerous activity.

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

ENTERED: APRIL 8, 2008

CLERK

Tom, J.P., Saxe, Nardelli, Williams, JJ.

3305 The People of the State of New York, Ind. 1158/02
Respondent,

-against-

Shawn Green,
Defendant-Appellant.

Scott Brettschneider, Uniondale, for appellant.

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

Judgment, Supreme Court, Bronx County (Megan Tallmer, J.), rendered December 3, 2004, convicting defendant, after a jury trial, of murder in the second degree and attempted murder in the second degree, and sentencing him to consecutive terms of 25 years to life and 15 years, respectively, unanimously affirmed.

Defendant's claims regarding bolstering testimony and improper impeachment by the prosecution of its own witness are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find that any errors in these regards were harmless in view of the overwhelming evidence of defendant's guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

We perceive no basis for reducing the sentence. Defendant's procedural claim regarding his sentencing is unpreserved (*see People v Green*, 54 NY2d 878 [1981]), and we decline to review it

in the interest of justice. As an alternative holding, we see no reason to remand for resentencing.

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

ENTERED: APRIL 8, 2008

CLERK

Tom, J.P., Saxe, Nardelli, Williams, JJ.

3306 The People of the State of New York, Respondent, Ind. 1938/04

-against-

Jose Veras, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Paula-Rose Stark of counsel), for respondent.

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered May 30, 2006, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the second degree, and sentencing him to a term of 3 years, unanimously affirmed.

After sufficient inquiry, the court properly denied defendant's motion to withdraw his 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 knowing,

intelligent and voluntary, and that the court properly determined that defendant's attacks on his plea lacked merit.

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

ENTERED: APRIL 8, 2008

CLERK

Tom, J.P., Saxe, Nardelli, Williams, JJ.

3307 Timothy Long, Index 114534/04
Plaintiff-Appellant-Respondent,

-against-

Tishman/Harris, etc., et al.,
Defendants-Respondents-Appellants.

Kazmierczuk & McGrath, Richmond Hill (John P. McGrath of counsel), and Rob Mazzuchin, Brooklyn, for appellant-respondent.

Weidenbaum & Harari, LLP, New York (Allan H. Carlin of counsel), for Tishman/Harris, Tishman Construction Corp., Frederick R. Harris, Inc. and New York City Economic Development Corporation, respondents-appellants.

D'Amato & Lynch, LLP, New York (Bill V. Kakoullis of counsel), for ADF Steel Corporation, respondent-appellant.

Order, Supreme Court, New York County (Rosalyn R. Richter, J.), entered January 8, 2007, which, insofar as appealed from as limited by the briefs, granted defendants' motions for summary judgment dismissing plaintiff's cause of action under Labor Law § 241(6), denied defendant contractor's motion for summary judgment on its third cross claim against defendant construction manager for breach of contract to procure insurance, and, on a search of the record, denied the construction manager's request for summary judgment dismissing such third cross claim, unanimously affirmed, without costs.

Plaintiff was injured while connecting a 66,000-pound girder to vertical steel columns on the roof of the building under construction. Plaintiff was standing on a beam some 60 feet

above the ground when the operator of the mobile crane hoisting the girder, following a communication from plaintiff to bring the girder closer, rolled the crane forward about two feet with the girder still hoisted in the air. According to plaintiff, this was incorrect procedure by the crane operator; he should have lowered his load before rolling the crane forward and then re-lifted the load after the crane was where he wanted it to be. Plaintiff asserts that the movement of the crane caused the girder to dangerously swing, which plaintiff attempted to control by grabbing onto one of the girder's ends, but the other end hit a safety railing on the roof of an adjacent building. Plaintiff asserts this safety railing was a substantial piece of steel that withstood the impact of the girder and caused its momentum to shift toward the end that plaintiff was holding. In the process, plaintiff's shoulder was injured.

Plaintiff argues that 12 NYCRR 23-8.1(f)(2) ("During the hoisting operation the following conditions shall be met: . . . (ii) The load shall not contact any obstruction") was violated when the girder came into contact with the safety railing on the roof of the adjacent building. The motion court, in the absence of case law construing this provision, properly relied on the dictionary definition of "obstruction" as something that hinders passage (Merriam Webster's Collegiate Dictionary 803 [10th ed 1995]), and correctly held, in effect, that the girder could not

be obstructed by anything once it left its intended track toward plaintiff and began to swing uncontrollably. Nor does 12 NYCRR 23-8.2(g)(1)(ii), which lists factors that must be taken into account in determining mobile crane stability ("freely suspended loads, track, wind or ground conditions, condition and inflation of tires, tire inflation, boom lengths and proper operating speeds for existing conditions"), avail plaintiff, given no evidence, or indeed claim, that the girder began to swing because factors like these were not taken into account. Rather, the reason the girder began to swing, according to plaintiff, was the action of the crane operator in rolling the crane forward with the girder still hoisted. No Industrial Code provision is cited for this claimed safety violation.

Under the circumstances, the certificate of insurance produced by the construction manager was sufficient by itself to raise an issue of fact as to whether it procured insurance for the steel contractor but not sufficient by itself to establish coverage as a matter of law (*see DiMaggio v Chase Manhattan Bank*, 266 AD2d 89 [1999]).

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

ENTERED: APRIL 8, 2008

CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on April 8, 2008.

Present - Hon. Peter Tom, Justice Presiding
David B. Saxe
Eugene Nardelli
Milton L. Williams, Justices.

The People of the State of New York, Ind. 4262/04
Respondent,

-against- 3308

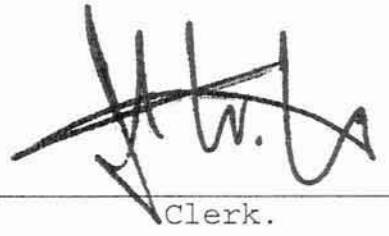
Ronald Williams,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (David Stadtmauer, J.), rendered on or about November 9, 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.

ENTER:



Clerk.

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

Tom, J.P., Saxe, Nardelli, Williams, JJ.

3309N Oscar Galdamez, et al., Index 107984/05
Plaintiffs-Respondents,

-against-

Biordi Construction Corp., et al.,
Defendants-Appellants,

John Doe Bonding Companies 1 through 3,
Defendants.

Milman & Labuda, Lake Success (Joseph M. Labuda of counsel), for appellants.

Barnes, Iaccarino, Virginia, Ambinder & Shepherd, PLLC, New York (James Emmet Murphy of counsel), for respondents.

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered October 23, 2006, which granted plaintiffs' motion to certify a class in an action to recover the prevailing rate of wages and supplemental benefits pursuant to Labor Law § 220, and for leave to prosecute the action on behalf of the class, unanimously affirmed, without costs.

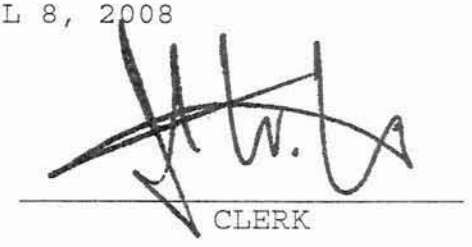
The court did not improvidently exercise its discretion in holding that plaintiffs met their burden of demonstrating the prerequisites for class action certification under CPLR 901 and 902 (*see Ackerman v Price Waterhouse*, 252 AD2d 179, 191 [1998]). Contrary to defendants' contention, plaintiffs sufficiently established that the class was so numerous that joinder of all

members was impracticable(*see Pesantez v Boyle Envtl. Servs.*, 251 AD2d 11 [1998]; *see also Robidoux v Celani*, 987 F2d 931, 935-936 [1993]), and the court properly considered affidavits from several members of the proposed class submitted on reply since the affidavits were in response to matters raised in defendants' opposition (*see Ticor Tit. Guar. Co. v Bajraktari*, 261 AD2d 156, 157 [1999]). Furthermore, to the extent the motion for class certification was untimely, the court providently exercised its discretion in deeming it timely since the delay in moving was largely the result of defendants' conduct during discovery (*see Caesar v Chemical Bank*, 118 Misc 2d 118, 121 [1983], *affd* 106 AD2d 353 [1984], *mod on other grounds* 66 NY2d 698 [1985]).

We have considered defendants' remaining contentions and find them unavailing.

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

ENTERED: APRIL 8, 2008



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Tom, J.P., Saxe, Nardelli, Williams, JJ.

3310N Nadel & Associates, P.C., Index 117823/06
Petitioner-Respondent,

-against-

Joseph O'Neil,
Respondent-Appellant.

Joseph O'Neil, appellant pro se.

Nadel & Associates, P.C., New York (Lorraine Nadel of counsel), for respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered March 5, 2007, which, to the extent appealed from as limited by the briefs, granted the petition to vacate an arbitration award, unanimously affirmed, without costs.

The arbitrator's notice of hearing was sent to the law firm's former business address, despite the firm's timely notification of a change of address. No evidence was offered that the notice was sent by registered or certified mail, as required by CPLR 7506(b). Upon being notified of the hearing at the time of its commencement, the firm requested adjournment of approximately 30 minutes so it could appear, but the request was denied, resulting in foreclosure of its presentation of pertinent and material evidence. This constituted an abuse of discretion

and misconduct within the meaning of CPLR 7511(b)(1)(i) (*Matter of Bevona v Superior Maintenance Co.*, 204 AD2d 136, 139 [1994]).

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

ENTERED: APRIL 8, 2008

CLERK

Mazzarelli, J.P., Andrias, Gonzalez, Acosta, JJ.

3342 The People of the State of New York, Ind. 6290/04
Respondent,

-against-

Harold Taylor,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Frances Gallagher of counsel), and Willkie Farr & Gallagher LLP, New York (Deirdre N. Hykal of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Sylvia Wertheimer of counsel), for respondent.

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered June 13, 2005, convicting defendant, after a jury trial, of criminal possession of a forged instrument in the second degree and resisting arrest, and sentencing him, as a second felony offender, to concurrent terms of 2 to 4 years and 90 days, respectively, unanimously affirmed.

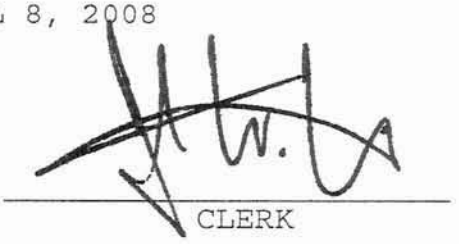
Viewed in light of the court's charge to the jury, the verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant failed to preserve his contention that the bent MetroCard found on his person did not fall within the statutory definition of a forged instrument (*see* Penal Law § 170.00[7]) or satisfy the requirements of Penal Law § 170.10(4), and also failed to preserve his related challenge to the court's main jury instruction, and we decline to review any

of these arguments in the interest of justice. As an alternative holding, we also reject them on the merits. A bent MetroCard qualifies as a forged instrument (*People v Mattocks*, __ AD3d __, appeal no. 2715 [decided simultaneously herewith]). In addition, we conclude that the evidence supported the inference that defendant possessed the card with the requisite knowledge and intent (*see* Penal Law § 170.25).

Any error in the court's supplemental instruction to the jury was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: APRIL 8, 2008



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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
Eugene Nardelli
Milton L. Williams
James M. McGuire
Rolando T. Acosta, JJ.

2715
Ind. 5481/05

The People of the State of New York,
Respondent,

-against-

Jonathan Mattocks,
Defendant-Appellant.

Defendant appeals from a judgment of the Supreme Court, New York County (Charles H. Solomon, J. on pretrial motion; Marcy L. Kahn, J. at jury trial and sentence), rendered June 7, 2006, convicting him of criminal possession of a forged instrument in the second degree, and imposing sentence.

Richard M. Greenberg, Office of the Appellate Defender, New York (Brian P. McCloskey and Sara Gurwitch of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Gina Mignola of counsel), for respondent.

NARDELLI, J.

The primary issue raised on this appeal is whether a New York City Transit MetroCard, which had been altered so that it could be used to enter the subway system when it contained a zero balance, satisfies the statutory definition of a forged instrument as set forth in Penal Law § 170.00.

Defendant Jonathan Mattocks, by New York County indictment (No. 5481/05) filed on October 26, 2005, was charged with 14 counts of criminal possession of a forged instrument in the second degree. Defendant subsequently filed an omnibus motion in which he sought to suppress all of the physical evidence seized from him, as well as any statements made to the police following his arrest. The motion court, in a decision and order entered January 31, 2006, denied defendant's application for a *Mapp/Dunaway* hearing on the grounds that the allegations of fact set forth by the defense were insufficient to warrant a hearing, and that defendant had not satisfactorily demonstrated standing to move to suppress the evidence. That branch of defendant's motion which sought a *Huntley* hearing was granted, and a hearing was held on April 26, 2006, after which the hearing court denied defendant's application to suppress his statements to the police.

Testimony educed at trial reveals that on October 19, 2005, at approximately 12:25 A.M., New York City Police Officers Jermaine Matos and Herman Valentin were on routine patrol, in

uniform, in the subway station located at 125th Street and Lexington Avenue, New York, New York. Officer Matos stated that he was ascending the stairs from the northbound platform when he observed defendant picking up MetroCards from the floor. Officer Matos then entered an office utilized by Metropolitan Transportation Authority (MTA)[1] personnel in order to observe defendant without being detected, and watched as defendant proceeded back and forth from a MetroCard reader to the turnstiles, swiped MetroCards, bent them along the magnetic strip, and approached riders while trying to solicit them. Officer Matos asserted that in the three to five minutes he was in the office, he observed defendant use the bent MetroCards to swipe two riders into the subway in exchange for money. Officer Valentin, on the other hand, viewing defendant from a different perspective, testified that he was approximately 50 feet away from the turnstiles and saw defendant swipe three riders into the subway. The officers both testified that they kept in contact with each other over their portable radios while observing defendant.

Officer Matos subsequently exited the office, approached defendant and said "hey," which prompted defendant to run up the

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[1]The Metropolitan Transportation Authority is a public service corporation created for the purpose of developing and improving commuter transportation and other services related thereto within the metropolitan commuter transportation district (Public Authorities Law § 1264[1]).

stairway toward the street. Officer Matos apprehended defendant in the stairwell and, during a search incident to arrest, Officer Valentin recovered 14 MetroCards from defendant, all of which were creased on a specific spot of the magnetic strip, as well as $3 from defendant's pocket.

Dr. James Eastman testified as an expert for the People regarding the MetroCard security system and explained that each MetroCard has a black magnetic strip that is electronically encoded with information, including the card's unique serial number. Each time a card is swiped at a turnstile and someone gains entry, the MTA's computer system reads and records the information stored on the card, maintaining a history of every MetroCard transaction.

Dr. Eastman pointed out that for value-based cards, which are limited to a specific dollar amount, information concerning the card's value is stored electronically on two variable fields on the magnetic strip and when swiped, both variable fields are read by the computer. If the turnstile computer grants access, it then deducts the cost of a ride and writes the remaining value onto the card. Dr. Eastman stated that the electronic notation reflecting the deduction is made in only one of the fields and, with each successful swipe, the computer deducts the appropriate value from alternating fields. Dr. Eastman, by way of example, explained that a MetroCard purchased for $4 initially registers

that amount in both fields and, when used for the first time, the computer deducts the $2 fare from only one field, leaving the other field at $4. The second time the card is utilized, the computer deducts $4 from the field containing the $4 amount, writes in a new amount of zero, and leaves the notation of $2 in the remaining field. Dr. Eastman stated that the reason for the double-field system is that in case of a computer writing error, or if the card is damaged, there is always a back-up field to give the rider "the benefit of the doubt."

Unfortunately, as Dr. Eastman explained, the system can be circumvented by purposely damaging the field on the magnetic strip which indicates the card has a zero balance by creasing or bending it precisely where the zero-value field is located, thereby destroying the information contained in that field. Dr. Eastman further noted that the zero-value field is generally located at a specific part of the magnetic strip and, once that information is destroyed, the computer then relies on the remaining field and reads a value of $2, enabling a passenger to enter the subway system without paying the fare. In order to gain admittance in this manner, however, the card must be swiped twice, although the swipes do not have to be consecutive. Accordingly, an individual attempting to create and then sell a free ride can swipe the card once at a turnstile and then return later, once a willing customer is found, to swipe the card a

second time to procure entry.

Dr. Eastman testified that of the 14 cards recovered from defendant, all had magnetic strips that had been creased or tampered with; 11 had a zero balance remaining on them, but none of them had last been used at the station where defendant was apprehended; 3 of the 11 cards had been successfully altered and could have been used for a free ride; and two of the cards had $2 remaining on them.

Robert Fraser, a station agent in the employ of the MTA who was assigned to the token booth on the night defendant was arrested, testified for the defense that when he began his shift, he noticed "a large amount of males," between the ages of 8 and 12, "loitering in the mezzanine area" and observed them "selling swipes at the turnstiles." Fraser notified Station Command at the MTA and, approximately one hour later, he saw the police apprehend a man, although he did not see who was apprehended.

Defendant was subsequently convicted by a jury, on May 11, 2006, of one count of criminal possession of a forged instrument in the second degree[2] and on June 7, 2006, the sentencing court adjudicated defendant a second felony offender and imposed a sentence of from two to four years imprisonment. Defendant appeals and asserts that the People failed to prove, by legally

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[2]The trial court, rather than submit a separate count for each MetroCard, determined to submit only one count to the jury. Defendant did not object to this determination.

sufficient evidence, that the bent MetroCards found in his possession meet the statutory definition of a forged instrument. Defendant premises his argument on the assertion that a bent MetroCard no longer resembles an authentic MetroCard to the human eye and, thus, does not replicate the original in all ways. Defendant, however, neglects to argue the alternative: that even assuming a bent MetroCard is, in fact, a forged instrument, the evidence was still legally insufficient to establish his guilt. Defendant further maintains that in any event, the forgery statute was not the appropriate statute to have charged him under since the Legislature had enacted a specific provision which prohibits his alleged conduct as a misdemeanor (Penal Law § 165.16).

Since we find defendant's arguments to be unavailing, we now affirm.

Penal Law § 170.25 provides that:

> "A person is guilty of criminal possession of a forged instrument in the second degree when, with knowledge that it is forged and with intent to defraud, deceive or injure another, he utters or possesses any forged instrument of a kind specified in section 170.10."

A forged instrument is defined as a "written instrument which has been falsely made, completed or altered" (Penal Law § 170.00[7]), and such instruments can include "tokens, public transportation transfers, certificates or other articles

manufactured and designed for use as symbols of value usable in place of money for the purchase of ... services" (Penal Law § 170.10[4]). We harbor no doubt, and defendant does not dispute, that a MetroCard, which in substance is a computerized ticket specifically designed to replace tokens, falls squarely within the foregoing definition. Further, Penal Law § 170.00(1) defines a "written instrument" as:

> "[a]ny instrument or article, including computer data or a computer program, containing written or printed matter or the equivalent thereof, used for the purpose of reciting, embodying, conveying or recording information, or constituting a symbol or evidence of value, right, privilege or identification, which is capable of being used to the advantage or disadvantage of some person."

Here, it is clear, and defendant makes little effort to convince us otherwise, that a MetroCard, with its encoded "computer data," which is used for the purpose of "conveying or recording information" and is "capable of being used to the advantage ... of some person," is a "written instrument" as defined by Penal Law § 170.00(1). Rather, the crux of defendant's argument is that a bent MetroCard has not been "falsely altered" as defined in the Penal Law.

Penal Law § 170.00(6) states that:

> "[a] person 'falsely alters' a written instrument when, without the authority of anyone entitled to grant it, he changes a written instrument, whether it be in complete or incomplete form, by means of erasure,

> obliteration, deletion, insertion of new matter, transposition of matter, or in any other manner, so that such instrument in its thus altered form appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible maker or drawer."

Defendant maintains that the MetroCards in question do not fit within the above statutory definition because a bent MetroCard no longer resembles an authentic MetroCard to the human eye. The flaw in defendant's argument, however, is that it is not whether the MetroCards appear authentic to the human eye that is pivotal herein but, rather, whether the card appears authentic to the electronic eye of the scanning device embodied in the subway turnstiles. Thus, to be "falsely altered," a written instrument need not be perfectly altered. Here, the magnetic strip incorporating the computer data on certain MetroCards, which contained no valid fare, were altered so that the cards would appear, and be read, as authentic for the admission of a rider by the turnstile computers. Thus, the MetroCards in question, in their altered form, "appear[] or purport[] to be in all respects an authentic creation of or fully authorized by its ostensible maker or drawer" (*see generally People v Owens*, 12 Misc 3d 600 [2006]; *People v Roman*, 8 Misc 3d 1026[A] [2005]).[3]

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[3]We find no merit in defendant's alternative argument that because the data in one of the fields in the magnetic strip was destroyed, it cannot be deemed "altered" for the purposes of the statute, since Penal Law § 170.00(6) specifically contemplates the "obliteration" of encoded data.

Thus, the MetroCards in question were, pursuant to the statutory definition, "falsely altered."

In addition, we reject defendant's argument that because the conduct at issue falls within the ambit of a different statute which provides for a lesser penalty (*see* Penal Law § 165.16 [Unauthorized Sale of Certain Transportation Services]), prosecution under the forgery statutes was improper. It is settled that "[a]s a general rule, a statutory prohibition against a particular type of conduct will not be deemed to constitute the exclusive vehicle for prosecuting that conduct unless the Legislature clearly intended such a result" (*People v Duffy*, 79 NY2d 611, 614 [1992]). In this matter, we can discern no such Legislative prohibition, nor does defendant identify one, which might preclude defendant's prosecution under the forgery statutes.

Finally, defendant maintains that the hearing court erred in summarily denying his motion for suppression because he alleged sufficient facts to raise a question regarding whether the police had probable cause to arrest him, and his sworn statement of facts, in which he asserted that he was not engaging in any conduct other than seeking shelter and meeting with local acquaintances, was more than sufficient to warrant a *Mapp/Dunaway* hearing. Further, defendant avers that the hearing court erred when it held that he did not have standing to move to suppress

the evidence, having based its conclusion on the erroneous proposition that a defendant must claim ownership of the evidence in question in order to have standing to move to suppress it.

With regard to the standing issue, as the People concede, the Court of Appeals, subsequent to the hearing court's determination, has made it clear that a defendant is not required to personally admit possession of contraband in order to comply with the factual pleading requirements of CPL 710.60 (*see People v Burton*, 6 NY3d 584, 589 [2006]). Rather, a defendant can shoulder his evidentiary burden by utilizing a police officer's statement that the tangible property in question was seized from defendant's person (*id.*; *People v Johnson*, 42 AD3d 341, 343 [2007]; *People v Jenkins*, 32 AD3d 745, 746 [2006]). In the matter at bar, since the police officers alleged in their complaint that they recovered the 14 MetroCards from defendant, we conclude, on that basis, that he retained standing to seek suppression of the physical evidence.

Notwithstanding the foregoing, defendant's motion was properly denied. CPL 710.60(1) requires that a suppression motion be in writing, state the grounds upon which it is based, and "contain sworn allegations of fact, whether of the defendant or of another person or persons, supporting such grounds." A court may summarily deny a motion to suppress if the movant's papers do not allege a ground constituting a legal basis for

suppression, or the sworn allegations fail, as a matter of law, to support the ground alleged (CPL 710.60[3]; *People v Burton*, 6 NY3d at 587; *People v Jones*, 95 NY2d 721, 725 [2001]). In assessing the sufficiency of the defendant's factual allegations, and whether the defendant is entitled to a hearing, the Court of Appeals in *People v Mendoza* (82 NY2d 415, 426 [1993]) provided the following guidance: "[T]he sufficiency of defendant's factual allegations should be evaluated by (1) the face of the pleadings, (2) assessed in conjunction with the context of the motion, and (3) defendant's access to information." It must also be borne in mind that "[h]earings are not automatic or generally available for the asking by boilerplate allegations" (*id.* at 422; *see also People v Long*, 36 AD3d 132, 133 [2006], *affd* 8 NY3d 1014 [2007]).

In the matter at bar, the complaint clearly alleged that the police officers observed defendant taking money from individuals in exchange for defendant providing them access to the subway system by using MetroCards. The complaint further alleged that 14 MetroCards, which had been altered in a manner so as to allow access to the subway system despite the fact that the cards had a zero balance, were recovered from defendant. Defendant, in response, provided a general denial that he was engaged in criminal activity at the time of his arrest, and failed to address any of the specific allegations against him. Pointedly, defendant did not deny he had taken money from three individuals,

or that in exchange for the money, he provided them access to the subway system. Rather, defendant merely asserted that he was "seeking shelter and speaking with various neighborhood acquaintances." Since defendant failed to controvert the specific information provided by the People concerning the criminal activity which formed the predicate for his arrest, or to set forth any other basis for suppression, the court properly denied his application for a *Mapp/Dunaway* hearing (*People v Arokium*, 33 AD3d 458, 459 [2006], *lv* denied 8 NY3d 878 [2007]; see *also People v Scott*, 44 AD3d 427, 428 [2007], *lv denied* 9 NY3d 1009 [2007] [concluding assertions of innocent behavior are insufficient to controvert specific allegations of criminal activity]).

Accordingly, the judgment of the Supreme Court, New York County (Charles H. Solomon, J. on pretrial motion; Marcy L. Kahn, J. at jury trial and sentence), rendered June 7, 2006, convicting defendant of criminal possession of a forged instrument in the second degree, and sentencing him, as a second felony offender,

to a term of imprisonment of 2 to 4 years, should be affirmed.

All concur.

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

ENTERED: APRIL 8, 2008

CLERK