SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 23, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Andrias, Saxe, Sweeny, DeGrasse, JJ.

4346 The People of the State of New York, Respondent, Ind. 1163/06

-against-

Matthew Erving, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (David M. Cohn of counsel), for respondent.

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered December 15, 2006, convicting defendant, after a jury trial, of sexual abuse in the first degree, and sentencing him, as a second violent felony offender, to a term of 6 years, unanimously affirmed.

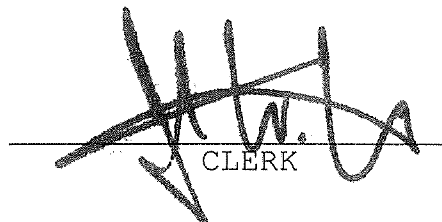
The court properly exercised its discretion when it declined to ask the jurors whether they had seen a newspaper article about this case that was published during the trial and contained an allegedly inflammatory headline and potentially prejudicial content (*see People v Moore*, 42 NY2d 421, 433-434 [1977], *cert denied* 434 US 987 [1977]). The court had repeatedly instructed the jury not to read any articles about the case, the article's

placement in the middle of the paper diminished the possibility that any jurors were exposed to it, and there was no indication that any jurors actually saw it (*see People v Rivera*, 31 AD3d 790 [2006], *lv denied* 7 NY2d 904 [2006]). To the extent that defendant is claiming that an inquiry was constitutionally mandated, such claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

The court properly denied defendant's request to charge sexual abuse in the third degree as a lesser included offense. In his testimony defendant denied using force, but also denied engaging in contact of a sexual nature. While he claimed he playfully tickled and poked his victim and fell with his head in her chest, this was not sexual contact within the meaning of Penal Law § 130.00(3). There was no reasonable view of the evidence that he subjected his victim to sexual contact without her consent but without using force (*see generally People v Glover*, 57 NY2d 61, 63 [1982]).

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

ENTERED: OCTOBER 23, 2008



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Lippman, P.J., Andrias, Saxe, Sweeny, DeGrasse, JJ.

4348 Juan Perez, Plaintiff-Respondent, Index 103878/04

-against-

NYC Partnership Housing Development Fund Company, Inc., et al., Defendants-Appellants.

O'Connor Redd, LLP, White Plains (Joseph A. Orlando of counsel), for appellants.

Law Office of Michael Singer, P.C., New York (Elizabeth Mark Meyerson of counsel), for respondent.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered June 19, 2008, which granted plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim, unanimously affirmed, with costs.

Defendants' suggestion to the contrary notwithstanding, plaintiff was not required to show that the ladder on which he was standing was defective (*see Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173 [2004]). As we observed in *Orellano v 29 E. 37th St. Realty Corp.* (292 AD2d 289, 291 [2002]), it is "sufficient for purposes of liability under section 240(1) that adequate safety devices to prevent the ladder from slipping or protecting plaintiff from falling were absent"; *see also Hart v Turner Constr. Co.*, 30 AD3d 213 [2006]; *Peralta v American Tel. & Tel. Co.*, 29 AD3d 493 [2006]).

The testimony of plaintiff's supervisor that he saw plaintiff on the top step of the ladder, shortly before the accident, does not raise a triable issue of fact as to whether plaintiff was the sole proximate cause of his injuries. There is no evidence that plaintiff was not using the ladder correctly at the time of his accident, or that such prior misuse contributed in any way to the happening of the accident. The supervisor did not witness the accident and conceded that he did not know why plaintiff fell.

Finally, there were no material inconsistencies between plaintiff's testimony at the General Municipal Law § 50-h hearing and his deposition, with regard to the occurrence of the accident, that would cast doubt on his credibility.

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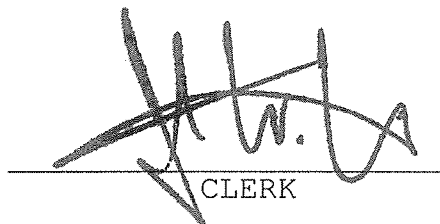

CLERK

Lippman, P.J., Andrias, Saxe, Sweeny, DeGrasse, JJ.

4349 In re Cresean W.,

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

Betty H.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

Neal D. Futerfas, White Plains, for appellant.

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

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

Order, Family Court, New York County (Sheldon M. Rand, J.H.O.), entered on or about August 30, 2006, insofar as it directed, after a fact-finding hearing, the child's removal from his maternal cousin's care in contemplation of adoption, unanimously affirmed, and appeal from so much of the aforesaid order as continued the child's placement in foster care at Children's Village until February 26, 2007, with provision for visitation with respondent, unanimously dismissed as moot, without costs.

In this contested permanency hearing pursuant to Family Court Act § 1089(d), the court appropriately heard and weighed the teenaged child's strong and clearly expressed preference for remaining in the home of his maternal cousin, where he had spent

most of his life (*see Matter of Lozada v Lozada*, 270 AD2d 422 [2000]). However, in weighing all the factors involved in analyzing the child's best interests, including his medical and educational needs and the indicated reports of neglect involving his cousin's home, the court made a reasoned determination that the child's best interests would be served by returning him to the facility where he had previously spent four years, with a goal of adoption (*Matter of Cornell v Cornell*, 8 AD3d 718, 719 [2004]; *see Dintruff v McGreevy,* 34 NY2d 887 [1974]). The court retained jurisdiction in order to continue monitoring the child's condition in periodic permanency hearings. The terms of the dispositional order placing the child in institutional foster care until February 26, 2007 have thus been superseded by subsequent order of the court (*see Matter of Qiana C.*, 46 AD3d 479 [2007]).

THIS CONSTITUTES THE DECISION AND ORDER
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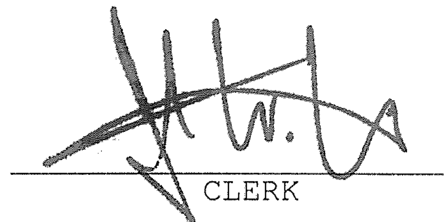

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Lippman, P.J., Andrias, Saxe, Sweeny, DeGrasse, JJ.

4350 In re Roberta Bauer, Index 109993/07
Petitioner,

-against-

New York State Office of Children
and Family Services, etc.,
Respondent.

Harvey A. Herbert, Brooklyn, for petitioner.

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

Determination of respondent dated April 3, 2007, after an evidentiary hearing, to suspend and revoke petitioner's license to operate a group family day care home, and to deny her application to renew her license, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Sheila Abdus-Salaam, J.], entered November 26, 2007), dismissed, without costs.

Petitioner's argument that she was denied due process is not preserved for review (*see e.g. Melahn v Hearn*, 60 NY2d 944, 945 [1983]), and we decline to review it. As an alternative holding, we hold that the delay between the 2003 incident in which petitioner allegedly bit a child for whom she was caring and the 2007 license revocation did not violate due process. Petitioner was allowed to continue to operate her day care home after the

2003 incident, and she was not deprived of a protected interest, namely, her right to work, until she received the Bureau of Early Childhood Services' January 26, 2007 letter. She then received an administrative hearing on March 27, 2007 and a determination on or about April 3, 2007. This was within constitutional limits (*see Federal Deposit Ins. Corp. v Mallen*, 486 US 230, 243 [1988]). Nor is there merit to petitioner's argument that she was deprived of due process because the agency relied on hearsay (*see People ex rel. Vega v Smith*, 66 NY2d 130, 139 [1985]).

Substantial evidence supports respondent's findings that petitioner violated relevant regulations (*see e.g. Matter of Seemangal v New York State Off. of Children & Family Servs.*, 49 AD3d 460 [2008]). Not only was there an "indicated" report that petitioner had bitten a child, but petitioner also employed a person who had been convicted of first-degree sexual abuse of a child. Unlike the old convictions in *Matter of Hollingshed v New York State Off. of Mental Retardation & Dev. Disabilities* (2008 NY Misc LEXIS 1173 [Sup Ct, Bronx County, Williams, J.]) and *Boatwright v New York State Off. of Mental Retardation & Dev. Disabilities* (2007 NY Misc LEXIS 3399 [Sup Ct, NY County, Goodman, J.]), which were not job-related, a conviction for sexual abuse of a child is relevant to employment at a day care home.

The punishment was not excessive (*see Seemangal*, 49 AD3d at 461).

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

ENTERED: OCTOBER 23, 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 October 23, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
Richard T. Andrias
David B. Saxe
John W. Sweeny, Jr.
Leland G. DeGrasse, Justices.

x

The People of the State of New York,
Respondent,

Ind. 3466/06
4904/06

-against-

4353

Charles Black,
Defendant-Appellant.

x

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles H. Solomon, J.), rendered on or about October 23, 2007,

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.

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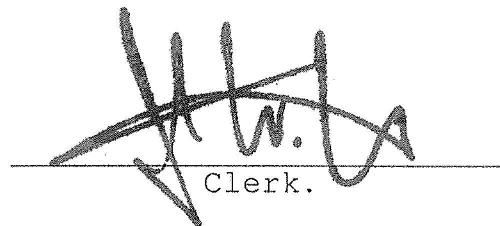

Clerk.

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

Lippman, P.J., Andrias, Saxe, Sweeny, DeGrasse, JJ.

4355 Michael Saitta, Index 25773/03
Plaintiff,

-against-

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

- - - - -

New York City Transit Authority, et al., 42160/05
Third-Party Plaintiffs-Respondents,

-against-

Allianz Insurance Company,
Third-Party Defendant-Appellant,

Bombardier Corp.,
Third-Party Defendant.

Gibbons P.C., Newark, N.J. (Verne A. Pedro of counsel), for appellant.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Joel M. Simon of counsel), for respondents.

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered January 9, 2008, which, in a third-party action seeking a declaration that third-party defendant insurer (Allianz) is obligated to defend and indemnify third-party plaintiffs additional insureds (collectively the Transit Authority) in the main action for personal injuries brought by an employee of Allianz's named insured, granted the Transit Authority's motion for summary judgment, unanimously affirmed, with costs.

It should have been apparent to Allianz that all of the

information it needed to issue a denial of coverage was contained in the enclosures forwarded by the Transit Authority along with its notice of the accident, including that the Transit Authority's claim arose out of the work of Allianz's named insured, that the injured person was an employee of the named insured, and that the Transit Authority's notice of the accident was untimely. Accordingly, Allianz's nearly four-month delay in disclaiming coverage, measured from its receipt of the Transit Authority's notice of the accident, was unreasonable as a matter of law, absent a reasonable explanation for the delay (*see First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 68-69, 70 [2003]). It does not avail Allianz to argue that it was not required to limit its investigation to the Transit Authority's delay, where its claims examiner could not say, at her deposition, what other grounds for denying coverage were investigated.

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

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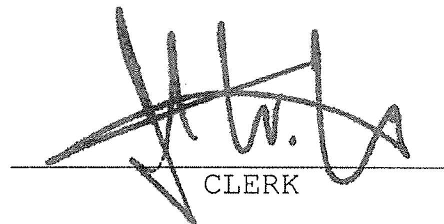

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Lippman, P.J., Andrias, Saxe, Sweeny, DeGrasse, JJ.

4356-
4356A First Sealord Surety, Inc., Index 107152/06
Plaintiff-Appellant,

-against-

Vesta 24 LLC, et al.,
Defendants-Respondents,

The American Millennium Fund LLC, et al.,
Defendants.

Levin & Glasser, P.C., New York (Paul G. Burns of counsel), for appellant.

Proskauer Rose LLP, New York (Andrew W. Gefell of counsel), for respondents.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered June 3, 2008, which, upon granting plaintiff's motion to reargue, adhered to a prior order, same court and Justice, entered July 5, 2007, granting defendants-respondents' motion to dismiss plaintiff's cause of action to foreclose a mechanic's lien, and denying plaintiff's cross motion to amend the complaint so as to correct the alleged filing date of the mechanic's lien, unanimously reversed, on the law, with costs, the motion to dismiss the foreclosure cause of action denied, and the cross motion to amend the complaint granted. Appeal from the July 5, 2007 order unanimously dismissed, without costs, as superseded by the appeal from the June 3, 2008 order.

Plaintiff filed a mechanic's lien on April 4, 2006 and

commenced an action on that lien on May 11, 2006. After learning that service of the lien was not compliant with Lien Law § 11-b, plaintiff discontinued the action on May 30, 2006 and filed a release of the lien on June 23, 2006. Meanwhile, on May 22, 2006, plaintiff filed a second lien, differing from the April 4 lien only in that it covered 10 lots instead of 13, and, on May 24, commenced the instant action, which was served on defendants via the Secretary of State on June 22, 2006. However, the complaint, while correctly alleging the three fewer lots identified in the May 22 lien, inadvertently incorporated without revision the paragraph of the first complaint alleging an April 4, 2006 filing date for the lien. Plaintiff apparently did not learn of this mistake until the end of May 2007, when defendants moved to dismiss the action on the ground that it was not commenced within a year of April 4, 2007 (Lien Law § 17). It further appears that on May 31, 2006, plaintiff's attorney, responding to any inquiry from defendants' attorney about the filing of a second lien, advised defendant's attorney, both orally and in writing, that the April 4 lien had not been served properly and would be released. On October 2, 2006, plaintiff filed a notice of pendency containing a description of the affected property identical to that in the May 22 lien, and stating that the action was one to foreclose on a mechanic's lien filed on May 22, 2006.

We reject the motion court's holding that because the April 4 lien was still pending when the instant action was commenced and because the minor differences between the two complaints would not have put defendants on notice that plaintiff was seeking foreclosure of the May 22 lien, the proposed amendment "is not a mere technicality" but rather an improper attempt to benefit from the relation back doctrine under CPLR 203(f). The amendment should have been allowed where the complaint substantially complies with the notice requirements of Lien Law § 17 (*see* Lien Law § 23), and defendants do not show, or even claim, prejudice or surprise as a result the mistaken allegation concerning the date of the lien's filing (*see* CPLR 3025[b]; *McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp.*, 59 NY2d 755 [1983]). As plaintiff does not seek to add a new cause of action, the relation back doctrine does not apply (*see* *Drwal v 101 Ltd. Partnership*, 271 AD2d 227 [2000]).

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

ENTERED: OCTOBER 23, 2008

CLERK

Lippman, P.J., Andrias, Saxe, Sweeny, DeGrasse, JJ.

4357 In re Ileana C.,
Petitioner-Appellant,

-against-

Administration for Children's Services,
Respondent-Respondent.

Jay A. Maller, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondent.

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

Order, Family Court, New York County (Susan M. Doherty, Referee), entered on or about April 11, 2007, which denied petitioner's application for grandparent visitation and dismissed the petition with prejudice, unanimously affirmed, without costs.

Petitioner failed to demonstrate that she had standing to pursue visitation and that visitation would be in the subject children's best interests (*see* Domestic Relations Law § 72[1]; *Matter of E.S. v P.D.*, 8 NY3d 150, 157 [2007]). Aside from one visit shortly after the children were placed in foster care, petitioner had no relationship with the children since the time they were 16 and 4 months old, respectively. As petitioner was unable to demonstrate a sufficient existing relationship with her grandchildren despite opportunities to foster one, she failed to show that conditions exist where "equity would see fit to

intervene" (Domestic Relations Law § 72[1]), and accordingly, she lacked standing to pursue visitation (*see Matter of Emanuel S. v Joseph E.*, 78 NY2d 178, 182-83 [1991]).

Furthermore, even assuming petitioner had standing, the evidence shows that the court properly determined that the children's best interests would be served by denying the petition. Petitioner lacked any meaningful relationship with the children and conceded that they would likely not recognize her and would think of her as a stranger (*see Matter of Sherman v Hughes*, 32 AD3d 959 [2006]). In addition to petitioner being unable to demonstrate that the children would gain any benefit from visiting with her, the evidence indicates that visitation with her might be harmful to the children because it would be confusing to them and could bring up issues of abandonment.

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

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

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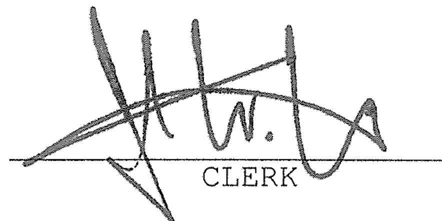

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Lippman, P.J., Andrias, Saxe, Sweeny, DeGrasse, JJ.

4358 Rita Chiusano, Index 601819/07
Plaintiff-Respondent,

-against-

Joseph Chiusano,
Defendant-Appellant.

Thaler Gertler, LLP, East Meadow (Richard G. Gertler of counsel), for appellant.

William J. Dockery, New York, for respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered January 15, 2008, which, insofar as appealed from, denied defendant's motion for summary judgment dismissing the complaint and on his counterclaim for attorneys' fees, unanimously affirmed, without costs.

The court correctly rejected defendant's contention that the term "MERC seat" in the handwritten paragraph of the modification of the parties' separation agreement refers only to the right to trade on the floor of the mercantile exchange. However, it erred in finding as a matter of law that "MERC seat" includes both the right to trade and the share of NYMEX stock. The term is reasonably susceptible to more than one interpretation (*see NFL Enters. LLC v Comcast Cable Communications, LLC*, 51 AD3d 52 [2008]; *LoFrisco v Winston & Strawn LLP*, 42 AD3d 304, 307-308 [2007]). Because the extrinsic evidence in the record is insufficient to resolve the ambiguity, the parties' intent must

be determined at trial (*see Hambrecht & Quist Guar. Fin., LLC v El Coronado Holdings, LLC*, 27 AD3d 204 [2006]; *LoFrisco* at 308).

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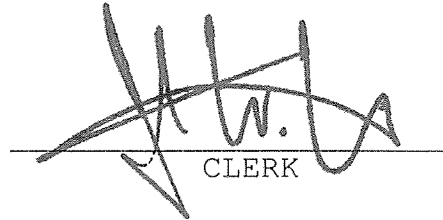

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Lippman, P.J., Andrias, Saxe, Sweeny, DeGrasse, JJ.

4359 People of the State of New York, ex rel. Allen Mack, Petitioner-Appellant, Index 51611/06

-against-

Warden, Rikers Island Correctional Facility, et al., Respondents-Respondents.

Judith E. Stein, New York, for appellant.

Allen Mack, appellant pro se.

Andrew M. Cuomo, Attorney General, New York (Marion R. Buchbinder of counsel), for respondents.

Order, Supreme Court, Bronx County (Caesar Cirigliano, J.), entered December 18, 2006, which dismissed petitioner's application for a writ of habeas corpus, unanimously affirmed, without costs.

Petitioner concedes he was convicted of crimes on the basis of conduct that gave rise to new charge #8, for which he was not afforded a preliminary hearing. Since that basis for revocation

superseded the issues raised at the revocation hearing, his current procedural challenge is moot (*People ex rel. Johnson v Russi*, 258 AD2d 346 [1999], *appeal dismissed & lv denied* 93 NY2d 945 [1999]; *Matter of Bennett v Kelly*, 251 AD2d 776 [1998], *lv denied* 92 NY2d 811 [1998]), and this proceeding was properly dismissed.

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

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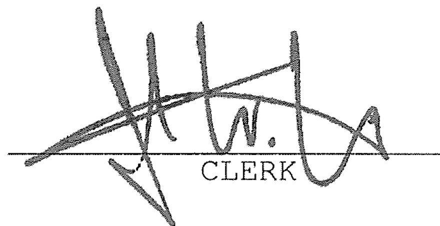

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Lippman, P.J., Andrias, Saxe, Sweeny, DeGrasse, JJ.

4360 June Bailey, Index 17038/06
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

Alexander J. Wulwick, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for respondent.

Order, Supreme Court, Bronx County (Paul Victor, J.), entered on or about August 22, 2007, which, insofar as appealed from as limited by the briefs, granted defendant City of New York's cross motion to dismiss the complaint, unanimously affirmed, without costs.

Dismissal of the complaint was appropriate, since the City is not a proper party to this action where plaintiff sustained injuries as a result of tripping and falling on public school grounds. Although the 2002 amendments to the Education Law (L 2002, ch 91) provide for greater mayoral control over education in the City and limit the powers of the Department/Board of

Education, they do not establish a basis to hold the City liable for the personal injuries sustained by plaintiff (*see Perez v City of New York,* 41 AD3d 378 [2007], *lv denied* 10 NY3d 708 [2008].

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

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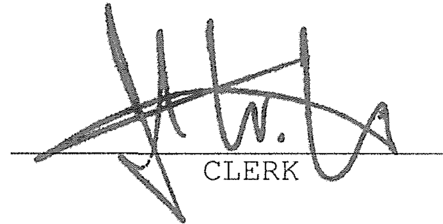

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Lippman, P.J., Andrias, Saxe, Sweeny, DeGrasse, JJ.

4361 The People of the State of New York, Respondent, Ind. 2279/05

-against-

Heriberto Delgado,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Bonnie B. Goldburg of counsel), for appellant.

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered on or about March 15, 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.

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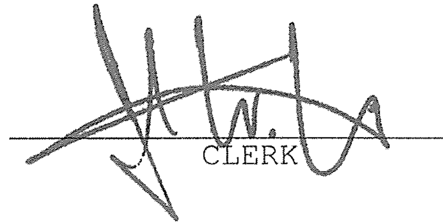

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Lippman, P.J., Andrias, Saxe, Sweeny, DeGrasse, JJ.

4362 Embraer Finance Ltd., Index 603107/05
Plaintiff-Appellant,

-against-

Servicios Aereos Profesionales, S.A.,
Defendant-Respondent.

Condon & Forsyth LLP, New York (Stephen R. Stegich of counsel), for appellant.

Penn Proefriedt Schwarzfeld & Schwartz, New York (Michael F. Schwartz of counsel), for respondent.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered February 21, 2008, which, to the extent appealed from, denied so much of plaintiff's motion as sought summary judgment on defendant's first counterclaim, unanimously reversed, on the law, with costs, that part of the motion granted and the first counterclaim dismissed.

The first counterclaim asserts breach of contract for defendant's purchase of an aircraft from plaintiff. Defendant claims plaintiff failed to convey to it certain items constituting part of the aircraft within the meaning of the Sale Agreement. However, upon delivery of the aircraft, defendant executed a certificate in which it "accept[ed] delivery of such aircraft and installed engines and propellers under the Aircraft Sale Agreement." The Sale Agreement states that the "Acceptance Certificate shall constitute conclusive evidence for all purposes

. . . that the Aircraft is satisfactory to Buyer and meets the technical and physical conditions set forth in this Agreement." Thus, all items included in the agreement's definition of "Aircraft" were necessarily accepted by defendant, and this acceptance is conclusive as to the technical and physical condition of the delivered item. Insofar as defendant argues plaintiff failed to provide those items in the Training and Warranty Agreement, that aspect of the contract was the subject of defendant's second counterclaim, whose dismissal was granted, and defendant has not appealed. Thus, even assuming the first counterclaim was timely under CPLR 203(d), defendant has failed to raise a triable issue of fact with regard to plaintiff's alleged breach of the Sale Agreement (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

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

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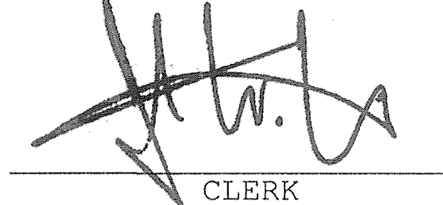

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Lippman, P.J., Andrias, Saxe, Sweeny, DeGrasse, JJ.

4363 Charles L. Cheeseboro, Jr., Index 105937/06
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant,

The City of New York,
Defendant.

Lester Schwab Katz & Dwyer, LLP, New York (John Sandercock of counsel), for appellant.

Miller & Eisenman, LLP, New York (Lee Miller of counsel), for respondent.

Order, Supreme Court, New York County (Karen S. Smith, J.), entered December 12, 2007, which denied defendant New York City Housing Authority's motion to dismiss plaintiff's complaint for failure to appear for an oral examination pursuant to General Municipal Law § 50-h, unanimously modified, on the law and the facts, to direct that plaintiff submit to a section 50-h hearing within 30 days of service of a copy of this order, and otherwise affirmed, without costs.

Denial of defendant's motion was appropriate, where plaintiff's scheduled section 50-h hearing was adjourned on consent.

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

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

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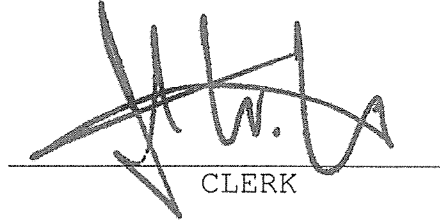


CLERK

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 October 23, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
Richard T. Andrias
David B. Saxe
John W. Sweeny, Jr.
Leland G. DeGrasse, Justices.

The People of the State of New York,
Respondent,

Ind. 2356/07

-against-

4364

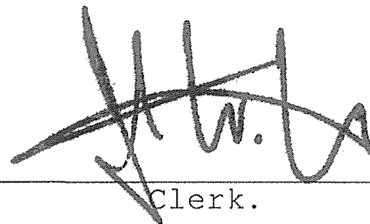
Kesha Robinson,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered on or about December 19, 2007,

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.

Lippman, P.J., Saxe, Friedman, Sweeny, Acosta, JJ.

4366 The People of the State of New York, Respondent, Ind. 1884/06

-against-

Robert Bland, Defendant-Appellant.

Jonathan I. Edelstein, New York, for appellant.

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

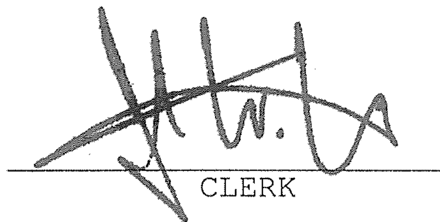
Judgment, Supreme Court, New York County (Renee A. White, J.), rendered December 12, 2006, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the second degree and conspiracy in the second degree, and sentencing him, as second felony offender, to concurrent terms of 8 years and 4½ to 9 years, respectively, unanimously affirmed.

After reviewing the parties' written submissions and employing its own familiarity with the case, the court properly denied defendant's motion to withdraw his guilty plea. Although there may be other procedural contexts in which a factual dispute can only be resolved by way of an evidentiary hearing (*see e.g.* CPL 710.60[4][suppression motions]), when a defendant moves under CPL 220.60(3) to withdraw a guilty plea, "[t]he nature and extent of the fact-finding procedures . . . rest largely in the discretion of the Judge to whom the motion is made. Only in the rare instance will a defendant be entitled to an evidentiary

hearing; often a limited interrogation by the court will suffice" (*People v Tinsley*, 35 NY2d 926, 927 [1974]; *see also People v Frederick*, 45 NY2d 520 [1978]). Here, defendant's factual assertions that his counsel had misadvised him to reject a more favorable plea than he ultimately entered, and that he pleaded guilty while under the influence of heroin and alcohol, were contradicted by affirmations from the attorney who had represented defendant at the time of the plea and from the prosecutor, by the record of several proceedings that led up to the plea as well as the plea allocution itself, and by the court's recollection of defendant's demeanor at the time of the plea. The record establishes that the plea was voluntary and that counsel rendered effective assistance.

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

ENTERED: OCTOBER 23, 2008



CLERK

Lippman, P.J., Saxe, Friedman, Sweeny, Acosta, JJ.

4367-
4367A-
4367B Maurice Oparaji, Index 1180/06
Plaintiff-Appellant,

-against-

The New York Mortgage Company, LLC,
Defendant-Respondent.

Maurice Oparaji, appellant pro se.

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

Order, Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered on or about October 22, 2007, which, in an action for racial discrimination pursuant to 42 USC § 3605 arising out of defendant's denial of plaintiff's loan application, denied plaintiff's motion for summary judgment and granted defendant's cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about January 11, 2008, which denied plaintiff's motion to reargue, unanimously dismissed, without costs, as taken from a nonappealable order. Appeal from order, same court (Lucy Billings, J.), entered on or about December 22, 2006, unanimously dismissed, without costs, as untimely.

The reason that defendant gave plaintiff for denying his 2004 loan application was that the property he wanted to buy "as

is" was not in habitable condition and therefore did not satisfy the Fannie Mae property and appraisal guidelines for the underwriting of residential mortgage loans (*see* Fannie Mae Single Family 2002 Selling Guide, part XI, chapter 2, § 202: Status of Construction [06/30/02], http://www.allregs.com/efnma). On its cross motion for summary judgment, defendant satisfied its initial burden to demonstrate the genuineness of this reason by submitting an appraisal report stating that "the floors, kitchens and bathroom utilities and windows are absent," and that "as per the real estate broker the subject dwelling is being sold as is." Nothing in the reviewable record tends to show that defendant's reliance on the appraisal report and Fannie Mae Selling Guide was a pretext for discrimination (*see Mitchell v Shane*, 350 F3d 39, 47 [2d Cir 2003]).

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

ENTERED: OCTOBER 23, 2008

CLERK

Lippman, P.J., Saxe, Friedman, Sweeny, Acosta, JJ.

4368 Shamel Smith, Claim 108916
Claimant-Respondent,

-against-

The State of New York,
Defendant-Appellant.

Andrew M. Cuomo, Attorney General, Albany (Frank K. Walsh of counsel), for appellant.

Peluso & Touger, LLP, New York (Pei Pei Cheng of counsel), for respondent.

Order of the Court of Claims of the State of New York (Faviola A. Soto, J.), entered March 30, 2007, which, insofar as appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing the claim brought pursuant to Court of Claims Act § 8-b for unjust conviction and imprisonment, unanimously affirmed, without costs.

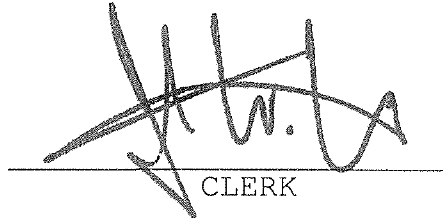
Claimant sufficiently met the statutory pleading requirements of Court of Claims Act § 8-b(3) by appending to his verified claim the decision of this Court (*People v Smith*, 306 AD2d 225 [2003]) regarding the underlying criminal prosecution (*see Lanza v State of New York*, 130 AD2d 872, 873 [1987]). Furthermore, the allegations in the claim coupled with this Court's decision vacating his conviction and dismissing the indictment sufficiently demonstrated claimant's likelihood of succeeding at trial in proving that "(a) he did not commit any of

the acts charged in the accusatory instrument or his acts or omissions charged in the accusatory instrument did not constitute a felony or misdemeanor against the state, and (b) he did not by his own conduct cause or bring about his conviction" (Court of Claims Act § 8-b[4]; *see Dozier v State of New York*, 134 AD2d 759, 761-762 [1987]; *Lanza,* 130 AD2d 872-874).

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

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

ENTERED: OCTOBER 23, 2008



CLERK

Lippman, P.J., Saxe, Friedman, Sweeny, Acosta, JJ.

4369 In re Madeline A.,

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

Nicole O., et al.,
Respondents-Appellants,

Administration for Children's Services,
Petitioner-Respondent.

Kenneth M. Tuccillo, Hastings-On-Hudson, for Nicole O., appellant.

Howard M. Simms, New York, for Raul A., appellant.

Michael A. Cardozo, Corporation Counsel, New York (Sharyn Rootenberg of counsel), for respondent.

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

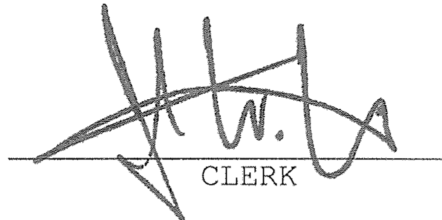
Order of disposition, Family Court, Bronx County (Douglas E. Hoffman, J.), entered on or about March 13, 2007, placing the subject child with the Commissioner of Social Services upon a fact-finding determination of abuse, unanimously affirmed, without costs.

A prima facie showing of abuse was made out with medical testimony that the three-month-old child was brought to the hospital with injuries that were of such a nature as not to be accidental, including internal cranial bleeding, fractures to the right knee, left ankle and left posterior rib, and retinal hemorrhages in her right eye (Family Ct Act § 1012[e][I];

1046[a][ii]). Respondents, who presented no medical evidence of their own, offered no explanation of the injuries, and presented no credible evidence demonstrating that the injuries could have been sustained accidentally, failed to rebut the presumption of culpability (*see Matter of Samuel L.*, 52 AD3d 394 [2008]; *Matter of Sara B.*, 41 AD3d 170 [2007]). We have considered respondents' other arguments, including that Family Court's County Law § 722-c compensation directive for a neurologist's expert services was inadequate, and find them without merit.

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

ENTERED: OCTOBER 23, 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 October 23, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
David B. Saxe
David Friedman
John W. Sweeny, Jr.
Rolando T. Acosta, Justices.

The People of the State of New York, Respondent, Ind. 395/07

-against- 4370

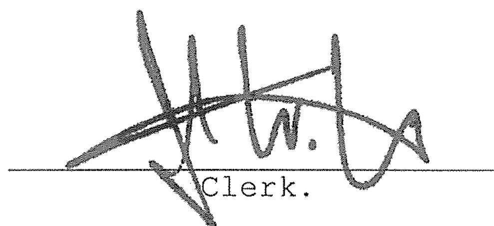
Jose Maldonado, Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael J. Obus, J.), rendered on or about December 3, 2007,

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.

Lippman, P.J., Saxe, Friedman, Sweeny, Acosta, JJ.

4374 Fred A. Lattanzio, et al., Plaintiffs-Respondents, Index 603791/04

-against-

Nicholas Lattanzio, et al., Defendants-Appellants,

Sherman & Peabody, Inc., Defendant.

[And a Third-Party Action]

Porzio, Bromberg & Newman, P.C., New York (Joseph Maddaloni, Jr. of counsel), for appellants.

Thomas J. Stein, New York, for respondents.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered November 27, 2006, which, insofar as appealed from as limited by the briefs, granted plaintiffs' motion for summary judgment on the eight and ninth causes of action and denied the cross motion of defendants Nicholas Lattanzio and Live Oak Capital, LLC for summary judgment dismissing the first, fourth, eighth, and ninth causes of action and their motion for leave to further amend the answer, unanimously affirmed, with costs.

The motion court did not improperly deny leave to defendants to further amend their answer, because "the factual basis of the proposed amended answer was known at the time of the original answer" (*Birdsall v City of New York*, 60 AD2d 522 [1977]) in December 2004. Furthermore, defendants, in their first motion to

amend in February 2006, had not made the change sought in their second motion, and they did not move to delete certain affirmative defenses until June 22, 2006, two days after plaintiffs had moved for summary judgment in reliance on one of those affirmative defenses (*see Hanford v Plaza Packaging Corp.*, 284 AD2d 179, 180 [2001]). Plaintiffs demonstrated that they would be prejudiced if leave to further amend were granted because discovery had been closed (*see e.g. Moon v Clear Channel Communications*, 307 AD2d 628, 630 [2003]). Defendants' excuse for their delay was not reasonable (*see id.*).

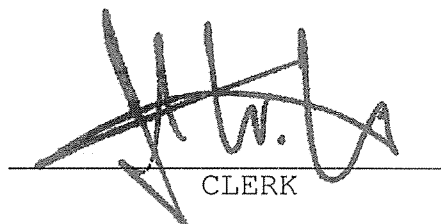
The court correctly granted summary judgment to plaintiffs on their breach of contract claims against Nicholas Lattanzio. Paragraph 68 of the answer states, "At all times during the communications between plaintiff Fred Lattanzio and defendant Nicholas Lattanzio, Nicholas Lattanzio expressly stated that the subject loan sought by him from the plaintiff was a personal one and that Nicholas Lattanzio individually would be solely responsible for the payment of the loan . . ." Defendants seek to create issues of fact by relying on events that happened after plaintiff Michael Ambrose provided the funds. However, the relevant issue is the contract that Nicholas Lattanzio and Fred Lattanzio agreed on.

The court properly denied Live Oak's motion for summary judgment dismissing the claims against it. Fred Lattanzio

testified at his deposition that he understood the borrower to be the group that was acquiring an investment company. Although he did not know it, Live Oak was part of that group. Therefore, a jury could find that Live Oak was responsible for repaying the loan (*see e.g. Wujin Nanxiashu Secant Factory v Ti-Well Intl. Corp.*, 22 AD3d 308, 311 [2005], *lv denied* 7 NY3d 703 [2006]; 9 Murray, Corbin on Contracts § 52.5, at 293 [rev ed]).

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

ENTERED: OCTOBER 23, 2008



CLERK

Lippman, P.J., Saxe, Friedman, Sweeny, Acosta, JJ.

4375 The People of the State of New York, Respondent, Ind. 495/04

-against-

Antonio Bonilla, Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered on or about October 7, 2004, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

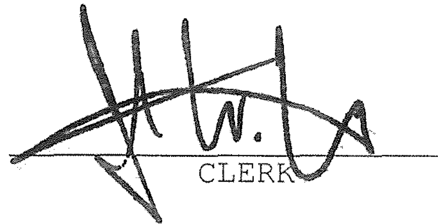
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: OCTOBER 23, 2008



CLERK

Lippman, P.J., Saxe, Friedman, Sweeny, Acosta, JJ.

4377-
4377A-
4377B Hass & Gottlieb, Index 605043/01
Plaintiff-Respondent,

-against-

Sook Hi Lee,
Defendant-Appellant.

Michael J. Noonan, Yonkers, for appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York (Brett A. Scher of counsel), for respondent.

Orders, Supreme Court, New York County (Charles E. Ramos, J.), entered May 29, 2007, which denied defendant's motion for a jury trial, and granted plaintiff's motion for summary judgment dismissing defendant's first two counterclaims for legal malpractice, and judgment, entered April 30, 2008, after a nonjury trial, awarding plaintiff the principal sum of $51,000 and dismissing defendant's third counterclaim, unanimously affirmed, with costs.

Even if plaintiff, in this action for attorney's fees, had been negligent and responsible for defendant failing to obtain a ruling fixing the effective date of her interest in a closely held corporation, defendant failed to show that she suffered any actual harm as a result (*IGEN, Inc. v White*, 250 AD2d 463 [1998], *lv denied* 92 NY2d 818 [1998]). There was no evidence of dividends paid out that defendant was unable to collect.

Furthermore, in the six years since the underlying judgment, defendant took no steps to bring additional proceedings to cure the alleged defect, so her claims of damages for extra expenses and costs were purely speculative. Similarly, defendant failed to raise any grounds for challenging the trial court's dismissal, following a six-day nonjury trial, of her claim for the return of documents. The gravamen of the court's decision was the credibility of the witnesses, a determination that should only be disturbed on appeal when clearly unsupported by the record (*Matter of Isaac Q.*, 217 AD2d 410, 411 [1995]). The record, which included contradictory testimony by defendant and her husband, sufficiently supported that finding.

Defendant's belated demand for a jury trial was properly denied. Neither party made a timely demand for a jury trial in 2003. The subsequent reversal of the underlying judgment and the restoration of that case to the active calendar did not extinguish defendant's waiver, or entitle her to an opportunity to change tactics in 2006 (*see Commack Enters. v Aetna Cas. & Sur. Co.*, 145 Misc 2d 157 [1989]).

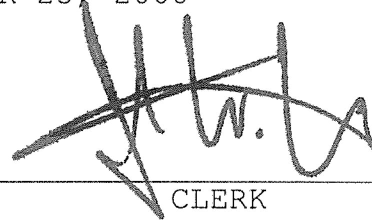
The court was within its discretion in refusing to recuse itself. The judge's remarks complained of were not ad hominem attacks, but observations of defendant's credibility and conduct in three related cases (*People v Moreno*, 70 NY2d 403 [1987]).

M-4578
M-4809 Hass & Gottlieb v Sook Hi Lee

Motion seeking leave to strike appeal denied and motion to supplement the record granted.

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

ENTERED: OCTOBER 23, 2008



CLERK

Lippman, P.J., Saxe, Friedman, Sweeny, Acosta, JJ.

4378-
4379 Ann Marie Nathel, Index 313512/05
Plaintiff-Appellant,

-against-

Sheldon Nathel,
Defendant-Respondent.

Bender Burrows & Rosenthal LLP, New York (Susan L. Bender of counsel), for appellant.

Cohen Goldstein Silpe, LLP, New York (Jeffrey R. Cohen of counsel), for respondent.

Order, Supreme Court, New York County (Marian Lewis, Special Referee), entered April 30 (dated March 27), 2008, which to the extent appealed from, limited the scope and duration of plaintiff's deposition of defendant, unanimously affirmed, without costs. Appeal from order, same court and Referee, entered April 30 (dated April 28), 2008, to the extent it denied plaintiff's application to preclude defendant's expert from relying on a document allegedly not produced, unanimously dismissed, without costs; the aforesaid order insofar as it precluded plaintiff from introducing at trial a real estate appraisal prepared or to be prepared pursuant to an earlier court order, unanimously modified, on the law and the facts, plaintiff permitted to introduce the appraisal provided it is served within a time to be set by the court following remand, and otherwise affirmed, without costs.

In light of plaintiff's two-year delay in seeking to take defendant's deposition and the imminence of trial, the referee did not improvidently exercise her discretion in limiting the scope and duration of defendant's deposition (CPLR 3103 [a]; *Kingsgate Assoc. v Advest, Inc.*, 208 AD2d 356 [1994]).

The referee properly exercised her discretion in denying plaintiff's application to preclude defendant from introducing two expert reports that were served after the deadline set by the court. Preclusion of expert reports on the ground of failure to comply with the rules governing exchange of reports is generally unwarranted, absent a showing that the noncompliance was willful or the party seeking preclusion was prejudiced by the lateness of the exchange (CPLR 3101[d][1][i]; 22 NYCRR 202. 16[g][2]; *McDermott v Alvey, Inc.*, 198 AD2d 95 [1993]). Here, defendant believed that the deadline for exchange of all expert reports had been extended one week. Even assuming defendant was mistaken, plaintiff did not show any prejudice resulting from the claimed one-week delay in service of the two expert reports.

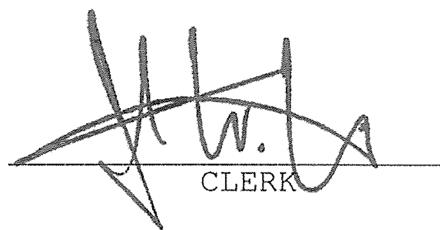
However, we find that the referee improvidently exercised her discretion in precluding plaintiff from using a real estate appraisal of the marital residence prepared or to be prepared pursuant to a court-ordered stipulation. Such a stipulation generally will be enforced unless the parties' agreement is shown

to have been the product of fraud, overreaching or duress (*Perito v Perito,* 135 AD2d 623 [1987]). Since no date was ever set for completion of the appraisal, there was no basis for precluding it on the ground of lateness, especially since preclusion would result in a lack of evidence on a key issue to be determined at trial. Upon remand, the trial court should set a date for the appraisal to be completed and furnished to the parties in advance of the expert's testimony.

The referee's denial of plaintiff's request to strike part of defendant's expert report concerning business valuation is not reviewable, since she indicated that the issue would be revisited at trial, and the record is insufficient for this Court to make a determination on the merits (*see Beharry v Guzman*, 33 AD3d 741, 742 [2006]).

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

ENTERED: OCTOBER 23, 2008



Lippman, P.J., Saxe, Friedman, Sweeny, Acosta, JJ.

4380 In re Aisha T.,

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

Isatou S.,
Respondent-Appellant,

Leake and Watts Services, Inc.,
Petitioner-Respondent.

Geoffrey P. Berman, Larchmont, for appellant.

Law Offices of James M. Abramson, PLLC, New York (Dawn M. Orsatti of counsel), for respondent.

Lawyers for Children, New York (Hal Silverman of counsel), and Orrick Herrington & Sutcliffe LLP, New York (Siobhan A. Handley of counsel), Law Guardian.

Order of disposition, Family Court, New York County (Sara P. Schechter, J.), entered on or about September 18, 2007, which, to the extent appealed from, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect was supported by clear and convincing evidence (Social Services Law § 384-b[7][a]). The record establishes that the agency made diligent efforts to encourage and strengthen the parental relationship by providing assistance so that respondent could meet her legal residency,

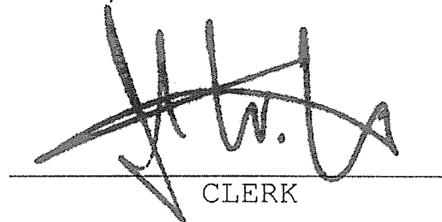
housing, financial and employment needs, and by scheduling regular visits with the child (see *Matter of William P.*, 23 AD3d 237 [2005]). Despite these diligent efforts, respondent failed to establish permanent legal residency, secure a suitable home environment, or obtain employment before the petition was filed. She was also inconsistent in her visitation, and at one point, failed for a period of approximately three months to have any contact with the child or the agency (*see Matter of Lenny R.*, 22 AD3d 240 [2005], *lv denied* 6 NY3d 708 [2006]).

The court appropriately declined to enter a suspended judgment in lieu of terminating respondent's parental rights, as suspending judgment was not in the child's best interests. The child, now five years old, has bonded with her foster family with whom she has lived since she was four days old, and "there was no evidence of a parental relationship with [respondent] sufficient to justify delay of the adoptive process" (*Matter of Jazminn O'Dell P.*, 39 AD3d 295, 295 [2007]).

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

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

ENTERED: OCTOBER 23, 2008



CLERK

Lippman, P.J., Saxe, Friedman, Sweeny, Acosta, JJ.

4381 530 West 28th St. LP, et al., Index 103701/08
Petitioners,

-against-

The New York State Liquor Authority,
Respondent.

Pesetsky and Bookman, New York (Randye F. Bernfeld of counsel), for petitioners.

Thomas J. Donohue, New York (Scott A. Weiner of counsel), for respondent.

Petition brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Carol R. Edmead, J.], entered May 8, 2008), challenging the determination of respondent New York State Liquor Authority, dated March 3, 2008, which found petitioner in violation of Alcoholic Beverage Control Law § 106(6), suspended its license and imposed a $13,000 civil penalty, unanimously granted, without costs, and said determination annulled.

The determination that petitioner permitted excessive noise to occur on its premises in violation of Alcoholic Beverage Control Law § 106(6) is not supported by substantial evidence. There were no complaints from residential tenants in the area; indeed, there was no evidence that anyone was affected by the noise. Three police officers testified to hearing music from the nightclub, each on a separate occasion. However, there was no

objective evidence that the music exceeded acceptable volume levels. The one meter reading that was obtained was unaccompanied by evidence that the measurement was taken at the distance prescribed by Administrative Code of the City of New York § 24-218(b)(1) (*see Matter of Culture Club of NYC v New York State Liq. Auth.*, 294 AD2d 204 [2002]).

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

ENTERED: OCTOBER 23, 2008

CLERK

Lippman, P.J., Saxe, Friedman, Sweeny, Acosta, JJ.

4382 Christopher Chunn, Index 116764/06
Plaintiff,

-against-

New York City Housing Authority,
Defendant-Respondent,

American Security Systems, Inc.,
Defendant-Appellant.

- - - - -

New York City Housing Authority, 590332/07
Third-Party Plaintiff-Respondent,

-against-

American Security Systems, Inc.,
Third-Party Defendant-Appellant.

- - - - -

New York City Housing Authority, 590870/07
Second Third-Party Plaintiff-Respondent,

-against-

National Casualty Company, et al.,
Second Third-Party Defendants-Appellants.

Kral, Clerkin, Redmond, Ryan, Perry & Girvan, LLP, New York (Rhonda D. Thompson of counsel), for American Security Systems, Inc., appellant.

Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for National Casualty Company and Scottsdale Insurance Company, appellants.

Herzfeld & Rubin, P.C., New York (David B. Hamm of counsel), for respondent.

Order, Supreme Court, New York County (Louis B. York, J.), entered March 11, 2008, which granted the motion of defendant/third-party plaintiff New York City Housing Authority

(NYCHA) for summary judgment declaring that third-party defendants American Security Systems, Inc. (ASSI) and National Casualty Company (NCC) are obligated to defend and indemnify it in the underlying personal injury action and denied ASSI's cross motion to sever the second third-party action and for a declaration that the indemnification provision of the service contract between NYCHA and ASSI is void and unenforceable pursuant to General Obligations Law § 5-322.1, unanimously modified, on the law, NYCHA's motion for summary judgment denied as to the obligation of ASSI and NCC to indemnify it in the underlying action and ASSI's motion to sever granted, and otherwise affirmed, without costs.

The comprehensive general liability (CGL) policy issued by NCC to ASSI provides for insurance for NYCHA as an additional insured with respect to liability for, inter alia, bodily injury caused, in whole or in part, by ASSI's "acts or omissions." The complaint asserts that plaintiff's injury was caused, in whole or in part, by ASSI's acts or omissions with respect to the NYCHA building's systems. Therefore, NYCHA is entitled to a defense under the policy (*see Santos v BRE/Swiss, LLC*, 9 AD3d 303 [2004]). Contrary to the insurers' contention that they have demonstrated as a matter of law that "there is no possible factual or legal basis on which [they] might eventually" be

obligated to indemnify NYCHA (quoting *Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 312 [1984] [omitting internal quotation marks and citation]), the affidavit by plaintiff's sister, a tenant in the building, which asserts that the intercom had been broken for several months before the incident in which plaintiff was assaulted, presents an issue of credibility that precludes summary judgment.

NYCHA is also entitled to a defense under the excess policy issued to ASSI by Scottsdale Insurance Company (SIC), because that policy follows the form of NCC's CGL policy, under which NYCHA is an additional insured (*see Cheektowaga Cent. School Dist. v Burlington Ins. Co.*, 32 AD3d 1265, 1266-1267 [2006]).

The insurers' ground for disclaiming coverage under the owners and contractors protective (OCP) policy issued by SIC, i.e., late notice, is belied by the record, as is their contention that notice to NCC did not constitute notice to SIC as well. However, in any event, any delay in notice was due to misleading statements by the NCC claims department concealing the existence of the OCP policy (*see Cicero v Great Am. Ins. Co.*, 53 AD3d 460 [2008]).

While the duty to defend is clear, issues of fact as to liability in the underlying personal injury action render premature the conclusion that the insurers have a duty to

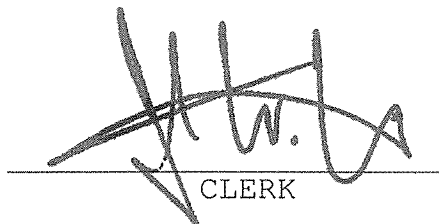
indemnify NYCHA (*see e.g. 79th Realty Co. v X.L.O. Concrete Corp.*, 247 AD2d 256 [1998]).

The second third-party action should be severed to avoid the prejudice to the second third-party defendants that would result from the jury's awareness of the existence of liability insurance (*see Kelly v Yannotti*, 4 NY2d 603 [1958]).

It would be premature to declare that the indemnification provisions of the contract between NYCHA and ASSI are void and unenforceable under General Obligations Law § 5-322.1 (*see Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 n 5 [1997]).

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

ENTERED: OCTOBER 23, 2008



CLERK

Lippman, P.J., Saxe, Friedman, Sweeny, Acosta, JJ.

4383 Louis Curcio, Index 113290/06
Petitioner-Respondent,

-against-

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

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

Shebitz Berman Cohen & Delforte, P.C., New York (Yogendra Patel of counsel), for respondent.

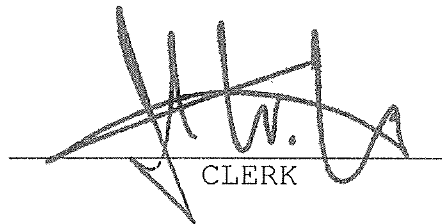
Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 20, 2007, which, insofar as appealed from as limited by the briefs, denied respondents' motion to dismiss so much of the petition as sought review of the termination of petitioner's probationary employment under his physical education license, and reinstated petitioner's physical education license nunc pro tunc to May 15, 2006, unanimously reversed, on the law, without costs, the motion granted, and so much of the petition challenging such termination dismissed.

Petitioner's challenge to the termination of his probationary employment under his physical education license, which was based on his alleged premeditated misuse of sick leave, should have been dismissed, since petitioner failed to establish that his termination "was for a constitutionally impermissible

purpose, violative of a statute, or done in bad faith" (*Matter of Frasier v Board of Educ. of City School Dist. of City of N.Y.*, 71 NY2d 763, 765 [1988]). Although the record shows that petitioner was not given the requisite 60-day statutory notice that his probationary employment was being terminated, which would ordinarily entitle him to one day's pay for each day the notice was late (*see Matter of Tucker v Board of Educ., Community School Dist. No. 10*, 82 NY2d 274, 277-278 [1993]; Education Law § 2573[1][a]), petitioner is not entitled to such payment because, upon termination of his probationary employment, he immediately resumed his duties at the same school and at the same rate of pay under his common branch license under which he was fully tenured.

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

ENTERED: OCTOBER 23, 2008



CLERK

Lippman, P.J., Saxe, Friedman, Sweeny, Acosta, JJ.

4384 The People of the State of New York, Respondent, Ind. 4854/03

-against-

Steven Mears, Defendant-Appellant.

Larry Sheehan, Bronx, for appellant.

Robert M. Morgenthau, District Attorney, New York (Alice Wiseman of counsel), for respondent.

Judgment, Supreme Court, New York County (Micki A. Scherer, J. on speedy trial motion; Joan C. Sudolnik, J. at jury trial and sentence), rendered August 22, 2005, convicting defendant of assault in the first degree, and sentencing him, as a second violent felony offender, to a term of 18 years, unanimously affirmed.

Defendant's challenge to the sufficiency of the evidence is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. Furthermore, the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility.

The court properly denied defendant's speedy trial motion. We reject defendant's assertion that all of the time between the declaration of a mistrial at defendant's first trial and the

commencement of the second trial was chargeable to the People because they never declared their readiness. On the contrary, adjournments necessitated by trial counsel's numerous absences and by defendant's trial on other charges were excludable (*see* CPL 30.30[4][a],[f]; *People v Reed*, 19 AD3d 312, 318 [2005], *lv denied* 5 NY3d 832 [2005]; *People v Mannino*, 306 AD2d 157 [2003], *lv denied* 100 NY2d 643 [2003]; *People v Brown*, 195 AD2d 310, 311 [1993], *lv denied* 82 NY2d 891 [1993]). Additionally, the adjournment from May 19, 2004, the day of the declaration of the first mistrial, to June 2, 2004, the next court date, was set down for "control purposes" and, as defendant conceded, this period was not chargeable to the People, who were entitled to a reasonable time to prepare for retrial (CPL 30.30[4][a]; *People v Sonds*, 287 AD2d 319 [2001], *lv denied* 97 NY2d 709 [2002]).

The court properly denied without a hearing defendant's CPL 330.30(3) motion to set aside the verdict on the ground of newly discovered evidence, based on the recantation affidavit of one of the prosecution witnesses. This witness's affidavit was inherently unreliable, especially as she lived in the same building as defendant's girlfriend, and as it contradicted her statement on the night of the incident as well as her testimony before the grand jury and at defendant's first and second trials

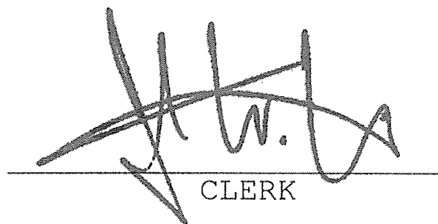
(*see People v Salemi*, 309 NY 208, 215-216 [1955], *cert denied* 350 US 950 [1956]; *People v Cintron*, 306 AD2d 151 [2003], *lv denied* 100 NY2d 601 [2003]; *People v Bermudez*, 243 AD2d 367 [1997], *lv denied* 91 NY2d 923 [1998]). Defendant's claim under *Brady v Maryland* (373 US 83 [1963]) is based on the same unreliable affidavit. In any event, even assuming the truth of the allegations, the *Brady* claim is still without merit.

Defendant's arguments concerning the grand jury presentation are meritless. Defendant's challenge to the trial court's justification charge is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 23, 2008



CLERK

Lippman, P.J., Saxe, Friedman, Sweeny, Acosta, JJ.

4385 Patrick McGarry, Sr., et al., Index 107635/05
Plaintiffs-Respondents-Appellants,

-against-

CVP 1 LLC, et al.,
Defendants-Appellants-Respondents.

Fiedelman & McGaw, Jericho (Ross P. Masler of counsel), for appellants-respondents.

Goldstein & Handwerker, LLP, New York (Steven T. Goldstein of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Joan A. Madden, J.), entered on or about April 16, 2008, which granted plaintiffs' motion for summary judgment on their Labor Law § 240(1) claim with respect to defendants CVP and Avalon Bay but denied their motion with respect to § 241(6), and granted defendants' cross motion for summary judgment dismissing the § 241(6) and § 200 claims but denied dismissal of the § 240(1) claim, unanimously modified, on the law, summary judgment on the § 241(6) claim denied to defendants CVP and Avalon Bay and granted to plaintiffs as against those two defendants, and otherwise affirmed, without costs.

Plaintiff Patrick McGarry, Sr. was injured when the first block on an unsecured cinder block staircase, leading from a platform supporting a material hoist to the concrete slab floor of the work site three feet below, skidded from under his foot.

The court correctly granted summary judgment on plaintiff's § 240(1) claim. The makeshift staircase was being used as access to different levels of the work site, including the floor where the injured plaintiff's safety equipment was stored in a Bovis shanty, and served as the "functional equivalent of a ladder" (*Wescott v Shear*, 161 AD2d 925 [1990], *appeal dismissed* 76 NY2d 846 [1990]). Because this plaintiff was in the process of retrieving the safety equipment needed to start his work day, the section is applicable (*Santamaria v 1125 Park Ave. Corp.*, 249 AD2d 16 [1998]). The fact that he fell only a short distance does not remove the protection afforded by § 240(1). A fall down a temporary staircase is the type of elevation-related risk the statute was intended to cover, regardless of the distance the worker falls (*Megna v Tishman Constr. Corp. of Manhattan*, 306 AD2d 163, 164 [2003]; *Siago v Garbade Constr. Co.*, 262 AD2d 945 [1999]).

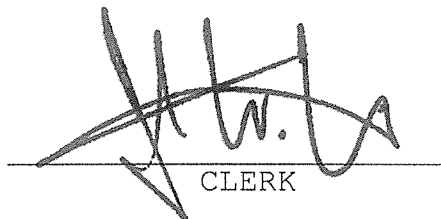
The court erred, however, in summarily dismissing the § 241(6) claim because defendants CVP (the property owner) and Avalon Bay (the general contractor) failed to establish that Industrial Code (12 NYCRR) § 23-1.7(f), governing vertical passageways, was inapplicable to the facts of this case (*Gonzalez v Pon Lin Realty Corp.* 34 AD3d 638, 639 [2006]; *see also Seepersaud v City of New York*, 38 AD3d 753, 755 [2007]). Inasmuch as plaintiffs have plainly demonstrated the unsafe

nature of the staircase as the means of access to different working levels, summary judgment is properly granted in their favor (*see Conklin v Triborough Bridge & Tunnel Auth.*, 49 AD3d 320, 321 [2008]).

The court correctly granted summary dismissal of the § 200 claim. Where an alleged defect or dangerous condition arises from the contractor's methods, liability for § 200 or common-law negligence requires a showing that the owner or construction manager exercised supervisory control over the work (*Lombardi v Stout*, 80 NY2d 290 [1992]; *Conforti v Bovis Lend Lease LMB, Inc.*, 37 AD3d 235 [2007]). The construction of a temporary staircase of cinder blocks is plainly part of one of the contractor's methods. It is uncontroverted by both plaintiffs and defendants that nonparty employer Bovis controlled the injured plaintiff's work and supervised the construction at the site (*see Buccini v 1568 Broadway Assoc.*, 250 AD2d 466, 468-469 [1998]).

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

ENTERED: OCTOBER 23, 2008



CLERK

Lippman, P.J., Saxe, Friedman, Sweeny, Acosta, JJ.

4386 Paula Wiley, Index 25877/04
Plaintiff-Respondent,

-against-

Anthony Briggs, et al.,
Defendants-Respondents,

"John Doe," et al.,
Defendants,

New York City Transit Authority,
Defendant-Appellant.

Wallace D. Gossett, Brooklyn (Anita Isola of counsel), for appellants.

Budin, Reisman, Kupferberg & Bernstein, LLP, New York (Christian M. McGannon of counsel), for Paula Wiley, respondent.

Law Office of Irwen C. Abrams, Brooklyn (Thomas D. Leff of counsel), for Briggs respondents.

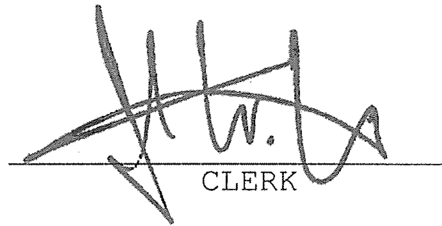
Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered on or about October 5, 2007, which denied defendant Transit Authority's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff was discharged into the street, 25 feet from the designated bus stop and 4 feet from the sidewalk where the curb was covered with 3 feet of snow. Because of the snowbank, she had to walk in the street. As she tried to cross the street to catch another bus, she was struck by a car. It cannot be said, as a matter of law, that her act of crossing from behind the bus was an extraordinary or unforeseeable act under these

circumstances. A question of fact exists as to whether the failure to discharge plaintiff in a safe area was a proximate cause of her accident (*Miller v Fernan*, 73 NY2d 844 [1988]; *Malawer v New York City Tr. Auth.*, 18 AD3d 293, 294-295 [2005], *affd* 6 NY3d 800 [2006]).

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

ENTERED: OCTOBER 23, 2008



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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 October 23, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
David B. Saxe
David Friedman
John W. Sweeny, Jr.
Rolando T. Acosta, Justices.

The People of the State of New York,
Respondent,

Ind. 2034/07
2035/07

-against-

4387

James Greene,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (John Byrne, J.), rendered on or about June 20, 2007,

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.

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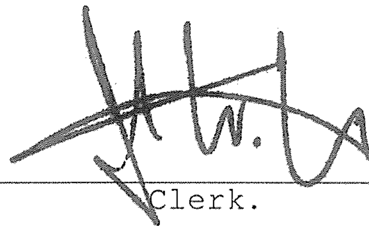


Clerk.

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

Lippman, P.J., Saxe, Friedman, Sweeny, Acosta, JJ.

4388N In re Freda Bailey, etc., Index 13299/07
Petitioner-Respondent,

-against-

The City of New York Housing Authority,
Respondent-Appellant.

Herzfeld & Rubin, P.C., New York (Neil R. Finkston of counsel), for appellant.

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJospeh, III of counsel), for respondent.

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered July 19, 2007, which granted petitioner's application for leave to file a late notice of claim based on respondent New York City Housing Authority's negligence in providing proper security at its housing complex where her son was shot and killed while walking between buildings in the complex, unanimously reversed, on the law and the facts, without costs, and the application denied.

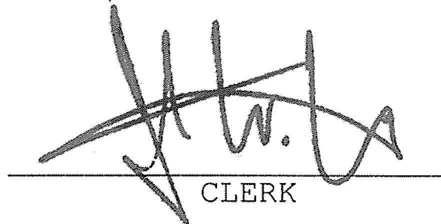
Petitioner failed to establish that respondent had actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter or to demonstrate that respondent was not prejudiced by the delay (*see* General Municipal Law § 50-e(5); *Semyonova* at 182). That there was media coverage of the shooting does not establish that respondent knew about the incident or anticipated a claim of negligence.

Moreover, petitioner failed to identify any documents from the police investigation or criminal proceedings that would assist respondent in investigating a claim of negligence (*see Matter of Rivera v New York City Hous. Auth.*, 25 AD3d 450, 451 [2006]). In the absence of such notice, the seven-month delay in filing the instant application compromised respondent's ability to identify witnesses and collect their testimony based upon fresh recollections (*id.*).

Moreover, leave is inappropriate for a "patently meritless" claim (*Matter of Catherine G. v County of Essex*, 3 NY3d 175, 179 [2004]). This Court has consistently held that "there is no common-law duty on the part of a landlord to protect tenants or other members of the public from criminal activity on public walkways outside its premises" (*Ward v New York City Hous. Auth.*, 18 AD3d 391 [2005]).

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

ENTERED: OCTOBER 23, 2008



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Tom, J.P., Saxe, Buckley, Gonzalez, Catterson, JJ.

2669-
2670 Claire Pickens, Index 350604/02
Plaintiff-Respondent,

-against-

Franklyn Castro,
Defendant-Appellant.

Lawrence H. Bloom, New York, for appellant.

McCarthy Fingar LLP, White Plains (Dolores Gebhardt of counsel), for respondent.

Order, Supreme Court, New York County (Laura Visitacion-Lewis, J.), entered on or about March 7, 2007, which, to the extent appealed from as limited by the briefs, denied defendant's motion to modify the prior order, entered November 29, 2006, which granted his application for the appointment of a receiver to sell the subject property and granted plaintiff's cross motion for attorney's fees and costs, unanimously affirmed, without costs. Appeal from the November 29, 2006 order unanimously dismissed, without costs.

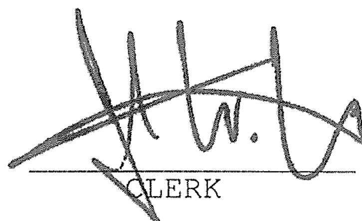
Defendant accepted the terms of plaintiff's proposed order for the appointment of a receiver which specified that the receiver was, among other things, authorized to obtain a mortgage or home equity loan, to be consolidated with the already existing loan, in order to sell the marital residence on the open market for the highest possible price. Thus, the motion court did not

err in directing the receiver to further encumber the property in order to comply with the parties' intent.

Further, the court properly awarded counsel fees and costs to plaintiff in the sum of $3,153.27 for the filing of a frivolous motion, based upon plaintiff's cross motion specifically asking for counsel fees and expenses incurred in opposing defendant's frivolous motion and the accompanying affirmation from her lawyer seeking an award of sanctions. The court found that the frivolous conduct undertaken by defendant was the filing of a motion that was "'undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another' (22 NYCRR 130-1.1[c][2])." Trial judges should be accorded wide latitude to determine the appropriate sanctions for dilatory and improper attorney conduct and we will defer to a trial court regarding sanctions determinations unless there is a clear abuse of discretion (*see Sawh v Bridges,* 120 AD2d 74, 78-79 [1986] *lv dismissed* 69 NY2d 852 [1987]). Here, we find that the motion court properly exercised its discretion.

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

ENTERED: OCTOBER 23, 2008



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OCT 23 2008

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
David Friedman
John T. Buckley
John W. Sweeny, Jr.
Dianne T. Renwick, JJ.

3675
Ind. 23/05

The People of the State of New York
Respondent,

-against-

Matthew Sanchez,
Defendant-Appellant.

Defendant appeals from a judgment of the Supreme Court, New York County (Roger S. Hayes, J.), rendered May 7, 2007, convicting him, after a jury trial, of gang assault in the second degree and imposing sentence.

Dershowitz, Eiger & Adelson, P.C., New York (Nathan Z. Dershowitz, Amy Adelson and Daniela Klare Elliott of counsel), for appellant.

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

FRIEDMAN, J.

In the early morning hours of January 1, 2005, two middle-aged men, Herbert Griffin and Liam McCormack, were assaulted in the street by three much younger men, defendant-appellant Matthew Sanchez and co-defendants Anthony Amitrano and Nenad Jurlina. The incident occurred after the three younger men left a bar as it was closing following a New Year's Eve party. McCormack, a part owner of the bar, refused to permit Sanchez to take his drink with him as he left. Taking offense at this, Sanchez removed McCormack's keys from the bar's front door and walked away with them, accompanied by Amitrano and Jurlina. The altercation began when McCormack caught up with Sanchez and his companions a few blocks away from the bar and demanded the return of his keys. Griffin, a friend of McCormack's, followed McCormack from the bar to help him confront defendants. It is undisputed that the trial evidence supports the jury's finding that Griffin suffered a serious head injury in this incident. McCormack, however, was not seriously injured.

Sanchez, Amitrano and Jurlina were indicted for gang assault in the first degree against Griffin (count I) and for attempted gang assault in the first degree against McCormack (count II). On the count relating to Griffin, the lesser included offenses of gang assault in the second degree, assault in the second degree, and assault in the third degree were submitted to the jury. On

the count relating to McCormack, the lesser included offenses of attempted gang assault in the second degree, attempted assault in the second degree, assault in the third degree, and attempted assault in the third degree were submitted to the jury. The jury was instructed (with the consent of all parties) to consider first the count against each defendant relating to Griffin and then to proceed to consider the count relating to McCormack only if that defendant was being acquitted of gang assault in both the first and second degrees on the count relating to Griffin. The jury was also instructed on principles of accessorial liability (*see* Penal Law art 20).

In pertinent part, the court charged the jury on gang assault in the second degree, the most serious lesser included offense submitted on the count relating to Griffin, as follows (emphases added):

> "Under our law a person is guilty of Gang Assault in the Second Degree when with intent to cause physical injury to another person and when aided by two or more other persons actually present he causes serious physical injury to such person.
>
> "Again, some of the terms have their own special meaning in the law. . . .
>
> "[A] person is actually present when such person is in a position to render immediate assistance to a person participating in the assault and is ready, willing and able to do so *irrespective of whether such person intended to cause physical injury*.
>
> "Because of this definition of actually present, *even if you find an individual defendant not guilty of this crime, because the People have not proven beyond a*

reasonable doubt that he had the intent required for the commission of the crime, you can still find another defendant or defendants guilty if you find that the not guilty defendant was actually present as I defined that term and that all the elements of the crime are proven by the People beyond a reasonable doubt."

"So, in order for you to find the defendant guilty of this crime the People are required to prove from all the evidence in the case beyond a reasonable doubt the following elements.

"One, that on or about January 1st, 2005, in the County of New York, the defendant Anthony Amitrano, or Nenad Jurlina, or Matthew Sanchez personally or by acting in concert with others caused serious physical injury to Herbert Griffin.

"The second element, that the defendant did so with the intent to cause physical injury to Herbert Griffin.

"Three, that the defendant was aided by two or more persons actually present. . . .

"Therefore, if you find the People have proven beyond a reasonable doubt each of those elements with respect to an individual defendant, you must find that defendant guilty of the crime of Gang Assault in the Second Degree.

"On the other hand, if you find the People have not proven beyond a reasonable doubt any one or more of those elements with respect to an individual defendant you must find that defendant not guilty of the crime of Gang Assault in the Second Degree."

As indicated by the italicized passages of the jury charge, the court instructed the jury, in substance, that an acquittal of one of the three defendants of gang assault on the count relating to a given victim did not require that the other two defendants also be acquitted of gang assault on that count. This charge was given over the objection of the defense, which argued that an acquittal of any defendant of gang assault required that the

other two defendants also be acquitted of gang assault.

During deliberations, the jury sent a note asking: "If the jury believes that there were two men on Griffin and one on McCormack can that constitute gang assault." Subject to the objections "previously made," the defense agreed that the court could respond that "[t]wo people on Mr. Griffin and one on McCormack assuming all the elements have been proven beyond a reasonable doubt can constitute gang assault." The jury was so instructed.

The jury convicted Sanchez and Jurlina of gang assault in the second degree against Griffin, and therefore did not return a verdict as to those two defendants on the count relating to McCormack. At the same time, the jury acquitted Amitrano of all charges relating to Griffin but convicted him of assault in the third degree against McCormack. This appeal by Sanchez ensued.

"A person is guilty of gang assault in the second degree when, with intent to cause physical injury to another person and when aided by two or more other persons actually present, he causes serious physical injury to such person or to a third person" (Penal Law § 120.06).[1] Focusing on the requirement that a conviction for this crime be supported by evidence that the

---

[1]We note that gang assault in the first degree (Penal Law § 120.07), of which all defendants were acquitted, requires that the defendant be proven to have acted "with intent to cause *serious* physical injury" (emphasis added), but is otherwise identical to the second-degree crime.

defendant acted while "aided by two or more persons actually present," Sanchez argues that the court erred in instructing the jury, over objection, that an acquittal of one of the three defendants on the count relating to a given victim did not require that the other two defendants also be acquitted of gang assault on that count. Relatedly, Sanchez further argues that the jury's acquittal of Amitrano on the count relating to Griffin means that the evidence was insufficient to support Sanchez's conviction for committing gang assault against Griffin, since there was no evidence that anyone other than the three defendants participated in the crime, and, to reiterate, the statute requires that guilt be predicated on a finding that Sanchez was "aided" by at least two other persons.

The foregoing arguments are based on the theory that a person cannot be found to have "aided" a defendant in committing a gang assault unless the "aid[ing]" person is himself guilty of gang assault, whether as principal or accomplice (*see* Penal Law § 20.00 [a person is liable as an accomplice to another's conduct constituting an offense "when, acting with the mental culpability required for the commission [of such offense], he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct"]). Stated otherwise, it is Sanchez's position that a person cannot be found to have "aided" a defendant in committing a gang assault unless the aiding person

shared the intent required to support a conviction for that crime (in this case, an intent to cause physical injury to Griffin). We disagree.

While there is relatively little case law explaining what it means to be "aided by two or more other persons actually present" in the gang assault context, the Legislature, in enacting the gang assault statutes (L 1996, ch 647), adapted this element from the statute defining robbery in the second degree, which provides that second-degree robbery includes forcible theft committed by a person while "aided by another person actually present" (Penal Law § 160.10[1]; *see* Senate Mem in Support of L 1996, ch 647, reprinted in 1996 McKinney's Session Laws of NY, at 2582 [drawing an analogy between the proposed gang assault statutes and second-degree robbery "by a person who is aided by another actually present"]; Donnino, Supp Practice Commentary, McKinney's Cons Laws of NY, Book 39, Penal Law art 120, 2008 Pocket Part, at 56).

The phrase "aided by another person actually present" in the robbery context describes an aggravating element that elevates the crime of robbery in the third degree, a class D felony (Penal Law § 160.05), to robbery in the second degree, a class C felony. In enhancing the severity of the punishment to which a person committing a robbery with aid from another is subject, the Legislature recognized that the presence of another individual lending aid at the crime scene subjects the victim to

significantly higher levels of danger and fear (*see People v Hedgeman*, 70 NY2d 533, 542 [1987]; *see also People v Dennis*, 146 AD2d 708 [1989], *affd* 75 NY2d 821 [1990] [where the defendant robbed the victim "on the street, in full view of the driver" of the getaway car, "the driver's presence posed a sufficient threat of additional violence so as to satisfy the aggravating element necessary to raise the offense to second degree robbery"]). A similar purpose motivated the Legislature's adoption of the gang assault statutes in 1996, under which a person's commission of an assault resulting in serious injury "when aided by two or more other persons actually present" elevates the crime from assault in the third degree, a class A misdemeanor (Penal Law § 120.00[1]), to gang assault in the second degree, a class C felony. The legislative memorandum in support of the bill enacting the gang assault statutes noted that "the joint action of numerous assailants is not only terrifying to victims but tends to increase the likelihood that severe or lethal injuries will be inflicted" (Senate Mem in Support of L 1996, ch 647, reprinted in 1996 McKinney's Session Laws of NY, at 2582).

Looking to second-degree robbery cases for guidance in resolving the issue presented by this gang assault case, we are persuaded by the decisions that have held that a person may be found to have "aided" another person's commission of an offense even if the aiding person did not have the intent required to be

found guilty of participating in that offense. In *People v Green* (126 AD2d 105 [1987], *affd* 71 NY2d 1006 [1988]), the Second Department reinstated a verdict convicting Green of second-degree robbery based on his having been "aided" by his co-defendant, Vizian, even though the same trial resulted in Vizian's acquittal. While one basis for the reinstatement of Green's conviction was that, contrary to the trial court's ruling setting aside the verdict, it was not repugnant to Vizian's acquittal under the instructions the jury had received (the correctness of which was not challenged), the Second Department further opined that "[t]he jury's finding of not guilty as to Vizian did not negative an element necessary to find [Green] guilty of robbery in the second degree" (126 AD2d at 110). The Second Department explained:

> "We believe that it is both factually and legally possible to be an 'aider' in the statutory context without being a principal in the commission of the crime. Thus, we do not find that the jury verdict at bar acquitting Vizian was conclusive as to any element of the crime of robbery in the second degree with respect to [Green] . . .
>
> "The Penal Law recognizes that one may aid in the commission of a crime without having the mental culpability necessary to be guilty of that crime as an accomplice. Penal Law § 115.00(1) provides that
>
> > '[a] person is guilty of criminal facilitation in the fourth degree when, believing it probable that he is rendering aid:
> >
> > '1. to a person who intends to commit a crime, he engages in conduct which provides such person with means or opportunity for the commission thereof and which in fact aids such person to commit a felony'.

> The language of Penal Law § 160.10(1) as compared to its predecessor, Penal Law of 1909 § 2124(2)[,] reveals that criminal facilitation in the fourth degree (Penal Law § 115.00) may be considered sufficient to constitute aid within the context of Penal Law § 160.10(1). Until the Penal Law was revised in 1965, the provision corresponding to 'aided by another person actually present' was 'aided by an *accomplice* actually present' (Penal Law of 1909 § 2124[2]; emphasis supplied). We find this revision significant and believe that it reflects an intention by the Legislature to permit a much lesser degree of mental culpability to constitute aid under this robbery statute. Under the revised Penal Law, in order to be criminally liable as an accomplice one must act 'with the mental culpability required' for the commission of the principal crime (Penal Law § 20.00). Clearly, a person may knowingly aid in the commission of a crime, i.e., as a facilitator, and lack the requisite mental culpability for the commission thereof. As reflected in the aforementioned definition of an accomplice, such mental culpability was an essential element of the prior robbery statute. The revision eliminated the need to establish that the greater degree of liability was present in the aider's conduct" (126 AD2d at 109-110, citing *People v Hampton*, 92 AD2d 490, 492-494 [1983] [Silverman, J., dissenting in part], *affd* 61 NY2d 963 [1984]).[2]

We recognize that the Court of Appeals affirmed the Second Department in *Green* based on the lack of repugnancy in the verdict, determined "solely on a review of the trial court's charge regardless of its accuracy" (71 NY2d at 1007), and that the Court of Appeals further noted that, given the posture of the *Green* case on the appeal (in which, to reiterate, the charge's

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[2]That providing "aid[] . . . [while] actually present" is a concept distinct from accomplice liability is illustrated by *People v Hedgeman* (70 NY2d 533 [1987], *supra*), in which the Court of Appeals held that constructive presence at the crime scene, although sufficient to render a person liable as an accomplice, is insufficient to render a person an aider of a crime committed by another for purposes of convicting the latter person of second-degree robbery under Penal Law § 160.10(1).

correctness was not challenged), the Second Department had no reason to engage in a factual analysis of the evidence (*id.* at 1008). In this case, however, the correctness of the trial court's charge is at issue, and Sanchez assiduously disclaims making any repugnancy argument. Thus, we are squarely faced with the question the Second Department addressed in the excerpt from *Green* quoted above, albeit in the context of gang assault rather than that of second-degree robbery. We find the *Green* analysis of this issue (which followed the analysis of the partially dissenting Justice at this Court in *Hampton*, 92 AD2d at 492-494) persuasive (*see also People v Harrison*, 141 AD2d 842, 842-843 [1988], *lv denied* 72 NY2d 1046 [1988] [following *Green* in holding that "one may aid in the commission of a crime without having the mental culpability necessary to be guilty of that crime as an accomplice"]; *People v Ward*, 107 AD2d 892, 894 [1985] [because the second-degree robbery statute "does not require that the person assisting share the perpetrator's intent," the court concluded that "it was factually and legally possible for the jury to find only one defendant guilty in connection with the robbery"]). Accordingly, we hold that the jury was correctly instructed that an acquittal of one of the three defendants of all charges relating to one victim would not require that the other two defendants be acquitted of the gang assault charges relating to that victim.

Further, on this record, the jury was entitled to conclude that Amitrano, while "actually present" at the scene, "aided" the assault on Griffin by Sanchez and Jurlina, even if the jury also concluded that Amitrano was not himself guilty of participating in the assault on Griffin either as a principal or as an accomplice. After all, the jury did convict Amitrano of committing third-degree assault against McCormack at the same time and place at which the other two defendants were assaulting Griffin, thus establishing that Amitrano was "actually present" at the scene of the incident (*cf. People v Hedgeman*, 70 NY2d at 535-536 [the requirement of the second-degree robbery statute that the aider be "actually present" excludes "a person who was only constructively present at the crime scene"]). As the People argue in their appellate brief, "by taking McCormack out of commission, Amitrano prevented McCormack from helping Griffin or otherwise thwarting Sanchez's attack on Griffin." The jury could rationally find that, while the People had proven that Amitrano's assault on McCormack had "aided" the other two defendants' assault on Griffin, the People had not proven beyond a reasonable doubt that Amitrano acted "with the intent to cause physical injury to Herbert Griffin," which the jury had been instructed was the intent required for conviction on the second-degree gang assault charge relating to Griffin. Thus, Sanchez's conviction of gang assault in the second degree is based on legally

sufficient evidence. We also find, upon our review of the facts, that the conviction is not against the weight of the evidence.

The case law on which Sanchez relies does not persuade us to reach a different result. In *People v Hampton* (*supra*), a majority at this Court affirmed an order setting aside a verdict convicting Hampton of robbery in the second degree, and, on further appeal, the Court of Appeals affirmed that result solely on the ground that the conviction was repugnant to the same jury's acquittal of the co-defendant who allegedly aided Hampton in committing the crime. The Court of Appeals noted that the issue in *Hampton* was the "repugnan[ce] of the verdict under the court's charge," which included an instruction that "if [the jury] found that either defendant did not act in concert with the other then it must acquit both defendants" (61 NY2d at 964). As in *People v Green* (*supra*), the Court of Appeals made clear in *Hampton* that "[t]he determination as to the repugnancy of the verdict is made solely on the basis of the trial court's charge and not on the correctness of those instructions" (*id.*). *Hampton*'s meaning as binding precedent is defined by the Court of Appeals' affirmance, not by the majority decision of this Court relied upon by Sanchez.

Similarly unavailing is Sanchez's reliance on this Court's decision in *People v Maldonado* (11 AD3d 114 [2004], *lv denied* 3 NY3d 758 [2004]), another repugnant verdict case. In *Maldonado*,

we noted that the conviction of one defendant for second-degree robbery was repugnant to his co-defendant's acquittal on that charge where "the court charged that the conduct and mental culpability of each of the defendants had to be sufficient to convict that person as an accomplice under Penal Law § 20.00" (11 AD3d at 118).[3] Our *Maldonado* decision does not discuss the correctness of the charge; rather, it discusses only whether the verdict returned by the jury was repugnant under that charge. Significantly, *Maldonado* distinguished *People v Green* (*supra*) on the ground that the *Green* jury - like the jury in this case - was *not* instructed that the aider had to have the same mental culpability as an accomplice (11 AD3d at 118). In any event, as previously noted, Sanchez assures us that he is not making a repugnancy argument.

In addition, Sanchez relies on *People v Coleman* (5 AD3d 956 [2004], *lv denied* 3 NY3d 638 [2004]), in which the Third Department reduced a conviction for robbery in the second degree to robbery in the third degree on the ground that there was insufficient evidence that the alleged aider intended to aid the defendant in the robbery. In so doing, the court expressed the view that, for purposes of the second-degree robbery statute,

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[3]Notwithstanding the repugnancy of the verdict, we affirmed the conviction in *Maldonado* on the ground that the defendant waived the right to pursue the issue on appeal when he failed to object to the discharge of the jury before the court ruled on his motion to set aside the verdict (11 AD3d at 116-117, 118-119).

"the aggravating element of being aided by one actually present requires some evidence of a shared intent to forcibly steal (*see* Penal Law § 20.00) or, at the very least, evidence of an intent by the aider to provide assistance to one who forcibly steals (*see* Penal Law § 115.00)" (5 AD3d at 959 [case citations omitted]). We note that the latter clause and the accompanying citation to Penal Law § 115.00 (criminal facilitation in the fourth degree) suggest that the Third Department may not have meant to take the position in *Coleman* (contrary to the same court's prior holding in *People v Ward, supra*) that the aider is required to possess the same mental culpability as the defendant being prosecuted. To the extent that *Coleman* may represent a departure from the *Ward* holding, we agree with *Ward* and respectfully disagree with *Coleman*.

Sanchez also argues that the court's charge was erroneous in that "no charge was given on what it means to 'aid' an assault." This argument refers to the court's instruction that "a person is actually present when such person is in a position to render immediate assistance to a person participating in the assault and is ready, willing and able to do so" (following CJI2d[NY] Penal Law § 120.06). Sanchez complains that this portion of the charge collapsed the definition of "aid" into the explanation of "actually present," and thereby may have led the jury to "conclude[] that it could convict [Sanchez] of gang assault if

[Amitrano] was 'present' at the scene, even if [Amitrano] did not 'aid' in the assault." This contention is unpreserved, as the defense never requested that the charge include a separate definition of "aid." Moreover, the defense did not object, beyond preserving "previously made" objections, when the court, in response to the jury's inquiry, stated that a gang assault conviction could be predicated on a finding that two defendants had attacked Griffin and one had attacked McCormack, so long as the jury found that "all the elements [of the offense] have been proven beyond a reasonable doubt." Alternatively, we find that the charge's lack of a separate definition of "aid" (which the published Criminal Jury Instructions also lack) does not constitute reversible error, as the statute does not use the word "aid" in a technical sense differing from its meaning in ordinary usage.[4]

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[4]In rejecting Sanchez's arguments on this point, we do not mean to suggest that it would not have been acceptable, or even preferable, for the charge to have included a separate definition of "aid." Nor do we mean to suggest that it would have been inappropriate for the court to respond to the jury's question by instructing it that, if two defendants were found to have attacked Griffin and one McCormack, the two who attacked Griffin could not be convicted of gang assault unless the third defendant's attack on McCormack had somehow "aided" the attack on Griffin (such as by preventing McCormack from coming to Griffin's aid). To reiterate, however, the defense did not request that the court give such a response. We also note that this is not a case in which the third alleged participant in the criminal activity (Amitrano) was exonerated of all charges; rather, he was convicted of third-degree assault against McCormack. Thus, under the jury's verdict, the three actors required for a gang assault conviction were involved in the incident.

We reject Sanchez's argument that the evidence was insufficient to establish his criminal liability for causing Griffin's serious head injury so as to satisfy the statute's element of "caus[ing] serious physical injury to such person" (Penal Law § 120.06). In this regard, Sanchez argues that the evidence establishes that the defendant who directly caused the serious physical injury to Griffin's head was Jurlina. Even if this characterization of the record is correct, the evidence still suffices to support the jury's finding that Sanchez caused serious physical injury to Griffin, as the jury was charged on the principles of accessorial liability under article 20 of the Penal Law, and was instructed that a guilty verdict on a gang assault charge relating to Griffin required proof that the defendant "personally *or by acting in concert with others* caused serious physical injury to Herbert Griffin" (emphasis added). Accordingly, the jury was entitled to find that Sanchez, by joining in the attack on Griffin with the requisite mental culpability, "intentionally aid[ed]" (Penal Law § 20.00) Jurlina in causing Griffin's serious physical injury, assuming that the evidence establishes that it was Jurlina who directly caused that injury. Sanchez's argument that "the general principles of accessorial liability do not apply to the gang assault statute" is both unpreserved and without merit (*see People v Hill*, 52 AD3d 380 [2008] [recognizing the application of principles of

accessorial liability in a gang assault case]). Also unpreserved and without merit is Sanchez's related argument that the jury should have been instructed that a gang assault conviction required a unanimous finding as to which defendant directly caused the serious physical injury.

The court properly denied Sanchez's CPL 330.30 motion to set aside the verdict. With respect to the branch of the motion claiming newly discovered evidence, the evidence at issue could have been produced at trial by the exercise of due diligence, and such evidence would not have been likely to affect the verdict in any event. With respect to the branch of the motion claiming jury misconduct, the court conducted a thorough hearing, and the hearing evidence supports the court's findings.

We modify the sentence as indicated in the exercise of discretion.

We have considered and rejected Sanchez's remaining claims.

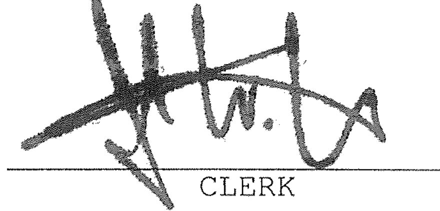
Accordingly, the judgment of the Supreme Court, New York County (Roger S. Hayes, J.), rendered May 7, 2007, convicting defendant-appellant Matthew Sanchez, after a jury trial, of gang assault in the second degree, and sentencing him to a term of 8 years, with five years post-release supervision, should be

modified, as a matter of discretion in the interest of justice, to reduce the term of imprisonment to 6 years, and otherwise affirmed.

All concur.

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

ENTERED: OCTOBER 23, 2008



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