SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 30, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Mazzarelli, Williams, Buckley, Renwick, JJ.

4430-
4430A
4430B The People of the State of New York, Respondent, Ind. 3320/05 3961/06 4168/06

-against-

Raymond Guarino,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Cahill Gordon & Reindel LLP, New York (Michael P. King of counsel), for appellant.

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

Judgments, Supreme Court, New York County (Arlene Goldberg, J.), rendered October 5, 2006, convicting defendant, after a jury trial, of criminal possession of stolen property in fourth degree (two counts) and criminal possession of stolen property in the fifth degree, and sentencing him, as a second felony offender, to an aggregate term of 2 to 4 years, and also convicting him, upon his pleas of guilty, of criminal possession of stolen property in the fourth degree and bail jumping in the second degree, and sentencing him to an aggregate term of 3 to 6 years, to run

consecutively to the sentences imposed on the trial conviction, unanimously affirmed.

Defendant's legal sufficiency argument is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also find that the verdict was based on legally sufficient evidence. Furthermore, the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). On the contrary, we find the evidence to be overwhelming. There is no basis for disturbing the jury's determinations concerning credibility; we note that the codefendant's testimony was thoroughly corroborated by police observations. The evidence established that defendant criminally possessed lost property that had become stolen within the meaning of Penal Law § 155.05(2)(b). Defendant acquired the victim's lost purse and credit cards and had no intention of making any effort, reasonable or otherwise, to return them; on the contrary, he intended to use the credit cards to benefit himself.

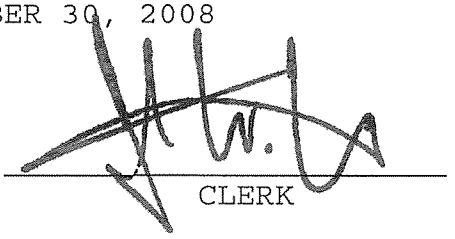
Any error in the receipt of uncharged crimes evidence was

harmless in view of the overwhelming proof of defendant's guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

We perceive no basis for reducing the sentences.

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

ENTERED: OCTOBER 30, 2008



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Lippman, P.J., Mazzarelli, Williams, Buckley, Renwick, JJ.

4431 Paul A. Esteva, et al., Index 104192/05
Plaintiffs, 590815/06

-against-

Kevin J. Nash, Esq., et al.,
Defendants.
- - - - - -
Kevin J. Nash, Esq., et al.,
Third-Party Plaintiffs-Appellants,

-against-

Michelle Ferguson, Esq., et al.,
Third-Party Defendants,

Fundex Capital Corporation,
Third-Party Defendant-Respondent.

Lewis Brisbois Bisgaard & Smith LLP, New York (Cristina R. Yannucci of counsel), for appellants.

Robbins & Associates, P.C., New York (James A. Robbins of counsel), for respondent.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered April 9, 2007, which, to the extent appealed from as limited by the briefs, granted the motion of third-party defendants Greenwald and Fundex to dismiss the third-party complaint against them, and denied third-party plaintiffs' cross motion to file a proposed amended third-party complaint for common-law indemnification for the alleged aiding and abetting of a breach of fiduciary duty, unanimously affirmed, with costs.

As we have previously held, "A party sued solely for its own alleged wrongdoing, rather than on a theory of vicarious liability, cannot assert a claim for common law indemnification" (*Mathis v Central Park Conservancy*, 251 AD2d 171, 172 [1998]). Here, the complaint did not propound any theory that defendants were vicariously liable to plaintiffs by dint of third-party defendant Fundex's actions. As a result, defendants are not entitled to the common-law indemnification they seek in the third-party action (*see Bleecker St. Health & Beauty Aids, Inc. v Granite State Ins. Co.*, 38 AD3d 231, 233 [2007]).

Furthermore, the court properly dismissed the contribution claim against Fundex for aiding and abetting a breach of fiduciary duty, and properly denied defendants' cross motion for leave to amend their third-party complaint. Indeed, neither the original third-party complaint nor the proposed amended version alleges any facts sufficient to suggest that Fundex provided substantial assistance to plaintiffs in their alleged breach of

fiduciary duty. The aiding-and-abetting claim must thus fail (*see Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 101 [2006], *lv denied* 8 NY3d 804 [2007]).

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

ENTERED: OCTOBER 30, 2008

Lippman, P.J., Mazzarelli, Williams, Buckley, Renwick, JJ.

4432 In re Pedro C.,

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

Josephine Patricia B., et al.,
Respondents-Appellants,

Pius XII Youth and Family Services,
Petitioner-Respondent.

Howard M. Simms, New York, for Josephine Patricia B., appellant.

Randall S. Carmel, Syosset, for Pedro Luis C., appellant.

John R. Eyerman, P.C., New York (Geoffrey P. Berman of counsel), for respondent.

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

Order of disposition, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about September 13, 2006, which, upon a finding of permanent neglect, terminated respondents' 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 is supported by clear and convincing evidence (Social Services Law § 384-b[7][a]). The record demonstrates that the agency made diligent efforts to

encourage and strengthen the parental relationship between respondents and the child, including providing respondent mother with referrals for psychiatric evaluations and parenting skills training, conducting random drug and alcohol screenings and scheduling regular visitation (*see Matter of Lady Justice I.*, 50 AD3d 425 [2008]; Social Services Law § 384-b[7][f]). Despite these diligent efforts, the mother continued to deny her alcohol problem and need for psychiatric medicine, and otherwise failed to meaningfully address the problems that led to the child's placement (*see Matter of Elizabeth Amanda T.*, 52 AD3d 376 [2008]; *Matter of Kimberly C.*, 37 AD3d 192 [2007], *lv denied* 8 NY3d 813 [2007]). Regarding respondent father, upon his filing of a paternity petition, the agency sent him a visitation schedule that accommodated his work schedule (*see Matter of Ailayah Shawneque L.*, 40 AD3d 1097 [2007], *lv denied* 9 NY3d 806 [2007]). However, the father visited the child sporadically, and, with the exception of one occasion, did so in the company of the mother, who dominated these visits. The father's failure to comply with the visitation schedule evinced a lack of interest in and dedication to achieving a productive relationship with his son (*see Matter of Shah Ronnie J.*, 298 AD2d 129 [2002]).

A preponderance of the evidence demonstrated that termination of respondents' parental rights was in the child's

best interests. The child was in a nurturing environment, where he attended school and therapy, and his special needs were tended to by his foster mother, who was also his maternal aunt (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The circumstances presented do not warrant a suspended judgment (*see Matter of Maryline A.*, 22 AD3d 227 [2005]).

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

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

ENTERED: OCTOBER 30, 2008

CLERK

Lippman, P.J., Mazzarelli, Williams, Buckley, Renwick, JJ.

4433 Savatree Toolsie, Index 23204/06
Plaintiff-Appellant,

-against-

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

Vogel & Rosenberg, New York (Stuart DiMartini of counsel), for appellant.

Wallace D. Gossett, Brooklyn (Alexandra Vandoros of counsel), for respondents.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about February 8, 2008, which, in an action for personal injuries, granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion denied, and the complaint reinstated.

Plaintiff was injured when she twisted her ankle and fell while disembarking a bus owned and operated by defendant Transit Authority. The record demonstrates that a triable issue of fact exists regarding whether, by stopping the bus several feet from the curb, defendant breached its duty to plaintiff to stop the

bus at a place from which she could safely disembark (*see Malawer v New York City Tr. Auth.*, 6 NY3d 800 [2006], *affg* 18 AD3d 293 [2005]; *Sutin v Manhattan & Bronx Surface Tr. Operating Auth.*, 54 AD3d 616 [2008]; *compare Trainer v City of New York*, 41 AD3d 202 [2007] [bus stopped away from curb because bus stop was blocked by non-Transit Authority traffic]).

THIS CONSTITUTES THE DECISION AND ORDER
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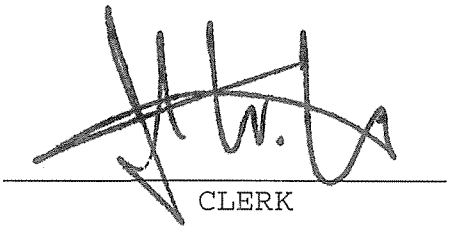
ENTERED: OCTOBER 30, 2008



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Lippman, P.J., Mazzarelli, Williams, Buckley, JJ.

4434 Bruce S. Simon, Index 303306/01
Plaintiff-Respondent,

-against-

Amy E. Simon,
Defendant-Appellant.

Law Offices of Sanford F. Young, P.C., New York (Sanford F. Young of counsel), for appellant.

Epstein Becker & Green, P.C., New York (Barry A. Cozier of counsel), for respondent.

Judgment, Supreme Court, New York County (Judith J. Gische, J.), entered April 1, 2006, inter alia, distributing marital property and awarding defendant maintenance and child support, unanimously modified, on the law and the facts, to delete the award of child support and to include an award of health insurance coverage separate from plaintiff's other maintenance obligations, the matter remanded to the trial court for a recalculation of the parties' respective child support obligations, and for a finding as to the cost of health insurance for defendant at the predivorce level of coverage, and otherwise affirmed, without costs.

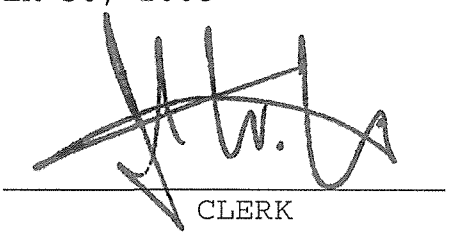
While no basis exists to disturb the trial court's crediting of plaintiff's testimony regarding the reduction in his income and its resulting finding that the parties' predivorce lifestyle

cannot be supported by their present combined income, under the circumstances, including the disparity in the parties' future earning capacity and defendant's ongoing health problems, the court should have directed that plaintiff pay defendant the cost of private health insurance, in addition to his regular nondurational maintenance obligation of $10,000 per month (*see Guneratne v Guneratne*, 214 AD2d 871, 873 [1995]; *Feldman v Feldman*, 194 AD2d 207, 219 [1993]). As the record does not permit a finding as to the cost of such health insurance, we remand for a determination thereof (*see Hendricks v Hendricks*, 13 AD3d 928, 930 [2004]). We also remand for a recalculation of child support, required because the court improperly included future maintenance payments as part of defendant's income (*see Huber v Huber*, 229 AD2d 904 [1996]). Upon recalculation, the trial court should deduct from the plaintiff's income the amount he pays in maintenance, but should not add the same amount to defendant's income (*see Tryon v Tryon*, 37 AD3d 455 [2007]). The court appropriately exercised its discretion in granting a five-day adjournment rather than the longer one requested by defendant's substitute counsel (*see Schneyer v Silberg*, 156 AD2d 200, 201 [1989] *lv denied* 77 NY2d 872 [1991]). Based on the court's schedule and the five-day adjournment granted, successor counsel had nearly a month to prepare for trial. We have

considered defendant's other arguments, including those relating to the classification, valuation and distribution of property and the award of maintenance, and find them unavailing.

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

ENTERED: OCTOBER 30, 2008



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Lippman, P.J., Mazzarelli, Williams, Buckley, Renwick, JJ.

4437 In re Timothy M.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

Tamara A. Steckler, The Legal Aid Society, New York (Susan Clement of counsel), for appellant.

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

Order, Family Court, New York County (Mary E. Bednar, J.), entered January 23, 2008, which adjudicated appellant a juvenile delinquent, upon a finding that he committed acts which, if committed by an adult, would constitute the crimes of attempted robbery in the first and second degrees, attempted assault in the second and third degrees, and attempted grand larceny in the fourth degree, and placed him in the custody of the Office of Children and Family Services for a period of 18 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility.

The evidence established that this incident was an attempted gunpoint robbery rather than a mere altercation, and it disproved appellant's justification defense beyond a reasonable doubt.

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

ENTERED: OCTOBER 30, 2008

CLERK

Lippman, P.J., Mazzarelli, Williams, Buckley, Renwick, JJ.

4438 John R. Carl, Index 117043/06
Plaintiff-Appellant,

-against-

Joel Cohen, Esq.,
Defendant-Respondent.

White and Williams LLP, New York (Rafael Vergara of counsel), for appellant.

Frankfurt Kurnit Klein & Selz P.C., New York (Ronald C. Minkoff of counsel), for respondent.

Order, Supreme Court, New York County (Carol Robinson Edmead, J.), entered June 18, 2007, which, to the extent appealed from, granted defendant's motion to dismiss plaintiff's claims for tortious interference with prospective business advantage and fraud, unanimously affirmed, without costs.

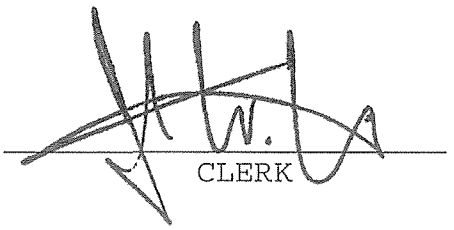
The fraud claim was duplicative of the legal malpractice claim since it was "not based on an allegation of independent, intentionally tortious" conduct (*Sabo v Alan B. Brill, P.C.*, 25 AD3d 420, 421 [2006]) and failed to allege "separate and distinct" damages (*White of Lake George v Bell*, 251 AD2d 777, 778 [1998], *lv dismissed* 92 NY2d 947 [1998]). The court did not improvidently exercise its discretion in denying leave to replead the fraud claim because the purportedly new evidence was insufficient to allege independent conduct not already included

in the legal malpractice claim.

The tortious interference claim was insufficient because it failed to allege that defendant had directed his fraudulent conduct at a specific third party, that said party would have hired plaintiff but for defendant's misconduct, and that defendant's wrongful conduct was motivated solely by an intent to injure plaintiff (*see Carvel Corp. v Noonan*, 3 NY3d 182 (2004).

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

ENTERED: OCTOBER 30, 2008



Lippman, P.J., Mazzarelli, Williams, Buckley, Renwick, JJ.

4439 The People of the State of New York, Ind. 6389/03
Respondent,

-against-

Marines Alejandro,
Defendant-Appellant.

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

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

Order, Supreme Court, New York County (Michael R. Ambrecht, J.), entered on or about February 14, 2007, which denied defendant's motion for resentencing, unanimously affirmed.

The court properly exercised its discretion under the Drug Law Reform Act when it determined that "substantial justice" dictated denial of resentencing (L. 2005, c. 643, § 1), in light of the seriousness of defendant's conduct (*see e.g. People v Jones*, 50 AD3d 282 [2008]; *People v Salcedo*, 40 AD3d 356 [2007] *lv dismissed* 9 NY3d 850 [2007]).

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

ENTERED: OCTOBER 30, 2008

CLERK

Lippman, P.J., Mazzarelli, Williams, Buckley, Renwick, JJ.

4440-
4440A Ace Property & Casualty Insurance Company, et al.,
Plaintiffs,

Allstate Insurance Company, etc.,
Plaintiff-Appellant,

-against-

Federal-Mogul Corporation, et al.,
Defendants-Respondents,

Cooper Industries LLC, et al.,
Defendants,

Allianz Global Corporate & Specialty AG, etc., et al.,
Defendants-Appellants.

Index 601535/07

Cuyler Burk, P.C., Parsippany, NJ (Andrew K. Craig, of the New Jersey Bar, admitted pro hac vice, of counsel), for Allstate Insurance Company, appellant.

Margolis Edelstein, Philadelphia, PA (Elit R. Felix, II, of the Pennsylvania Bar, admitted pro hac vice, of counsel), for Allianz appellants.

Rubin, Fiorella & Friedman, LLP, New York (Bruce M. Friedman of counsel), for American Re-Insurance Company and Executive Risk Indemnity, Inc., appellants.

Colliau Elenius Murphy Carluccio Keener & Morrow, New York (Dean Vigliano of counsel), for Columbia Casualty Company, Continental Casualty Company and The Continental Insurance Company, appellants.

Mendes & Mount, LLP, New York (Robert J. Keane of counsel), for Westport Insurance Corporation and Employers Reinsurance Corporation, appellants.

Rivkin Radler, LLP, Uniondale (Gary D. Centola of counsel), for Fireman's Fund Insurance Company and National Surety Corporation, appellants.

Gilbert Randolph LLP, Washington, DC (Stephen A. Weisbrod of counsel), for Federal-Mogul Corporation and Federal-Mogul Products, Inc., respondents.

Dickstein Shapiro, LLP, New York (Andrew N. Bourne of counsel), for Magnetek, Inc., respondent.

Orders, Supreme Court, New York County (Herman Cahn, J.), entered November 1, 2007, which, in a declaratory judgment action involving plaintiffs insurers' coverage obligations for bodily injury claims arising out of alleged exposure to asbestos-containing products that were manufactured, sold or distributed by defendants-respondents' predecessor in interest, insofar as appealed from, granted the motions of defendants Federal-Mogul Corporation and Federal-Mogul Products, Inc. (Federal-Mogul) and Magnetek, Inc. to stay the action to abide an action in New Jersey involving the same subject matter and many of the same parties, unanimously affirmed, without costs.

The insurers fail to show that the first-filed New Jersey action is vexatious, oppressive or was instituted to obtain some unjust advantage, that New York's interests in this dispute predominate over New Jersey's, or other reason for deviating from the generally followed first-in-time rule (*see White Light Prods. v On The Scene Prods.*, 231 AD2d 90, 96-97 [1997]), under which

"the court which has first taken jurisdiction is the one in which the matter should be determined and it is a violation of the rules of comity to interfere" (*id.* at 96 [internal quotation marks and citations omitted]). We have considered the insurers' other arguments and find them unavailing.

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

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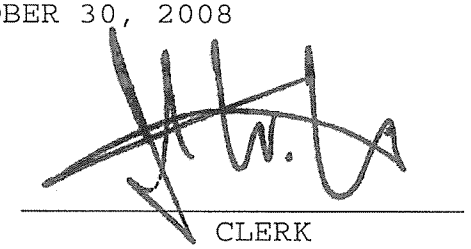

CLERK

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 30, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
Angela M. Mazzarelli
Milton L. Williams
John T. Buckley
Dianne T. Renwick, Justices.

The People of the State of New York, Ind. 866/07
Respondent,

-against- 4441

Roderic Bacote,
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 (Gregory Carro, J.), rendered on or about January 9, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

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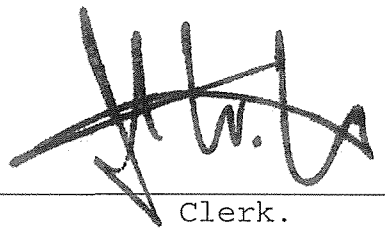


Clerk.

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

Lippman, P.J., Mazzarelli, Williams, Buckley, Renwick JJ.

4442 Aphrodite Pimentel, Index 21366/04
Plaintiff-Respondent,

-against-

Marx Realty & Improvement Co., Inc.,
Defendant-Appellant.

McAndrew Conboy & Prisco, LLP, Woodbury (Mary C. Azzaretto of counsel), for appellant.

Pena & Kahn, PLLC, Bronx (Steven L. Kahn of counsel), for respondent.

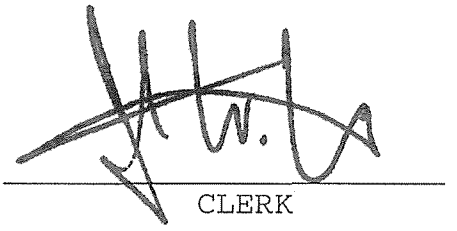
Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered on or about December 10, 2007, which denied defendant's motion for summary judgment, unanimously affirmed, without costs.

Defendant, an out-of-possession landlord that reserved the right of re-entry to inspect and make structural repairs, failed to demonstrate its entitlement to judgment as a matter of law (*Cortes v 1515 Williamsbridge Assoc.*, 295 AD2d 188 [2002]; *see Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 565 [1987]). Plaintiff's evidence raised an issue of fact as to

whether the lack of a handrail in the stairwell was a structural defect that violated a specific statutory provision, contributing to her fall.

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

ENTERED: OCTOBER 30, 2008



CLERK

Lippman, P.J., Mazzarelli, Williams, Buckley, Renwick, JJ.

4443 426-428 West 46th St. Owners, Inc., et al., Plaintiffs-Respondents, Index 603354/03

-against-

Greater New York Mutual Insurance Company, Defendant-Appellant.

Thomas D. Hughes, New York (Richard C. Rubinstein of counsel), for appellant.

Fried & Epstein LLP, New York (John W. Fried of counsel), for respondents.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered July 26, 2007, which denied defendant's motion for summary judgment dismissing the complaint and declaring that it need not defend or indemnify plaintiffs in an underlying personal injury action, unanimously affirmed, without costs.

The plaintiff in the underlying personal injury action (tenant) was injured when she fell down a staircase within the apartment she rented in a building owned by plaintiff 426-428 West 46th St. Owners, Inc. (Owners). Plaintiff 46th Street Associates, L.P. (Associates) was a shareholder of Owners and held proprietary leases on a number of the units in the building, including the tenant's apartment, and was also the managing agent for the building. Plaintiff Robert Gottesman was the president

of Owners and a member of its board of directors, and was also a general partner of Associates.

The record shows that the tenant's accident occurred in August 2002, and although defendant was not notified of the occurrence until June 2003, the motion court appropriately concluded that there are triable issues of fact as to whether plaintiffs' failure to timely notify defendant was based on a good-faith, reasonable belief of nonliability (*see e.g. Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742, 743-744 [2005]). The superintendent of the building discovered the tenant lying on the floor inside her apartment, and there is evidence, supported by the tenant's affidavit, that she did not mention the details of what had happened or the nature of her condition. Plaintiffs therefore had no way of knowing that the tenant had fallen due to an allegedly defective staircase in her home, particularly in light of her previous claims to have suffered from a medical condition that prevented her from paying her rent in a timely manner for several months. Under these circumstances, plaintiffs had some justification for assuming that the tenant's hospitalization was attributable to a continuing medical illness or condition such as would raise a question of fact as to whether it was reasonable for them not to undertake any further inquiry into how she had come to be lying

on her floor (*see D'Aloia v Travelers Ins. Co.*, 85 NY2d 825, 826 [1995]; *Aviles v Dryden Mutual Ins. Co.*, 278 AD2d 829 [2000].

The motion court also properly denied defendant's motion for summary judgment as against Associates and Gottesman on the basis that they were not covered under the policies defendant issued to Owners. It cannot be determined, as a matter of law, that the broad allegations advanced as against Associates and Gottesman in the underlying complaint did not encompass their status as insureds under the subject policies (*see e.g. Morales v Allstate Ins. Co.*, 170 AD2d 419 [1991]).

THIS CONSTITUTES THE DECISION AND ORDER
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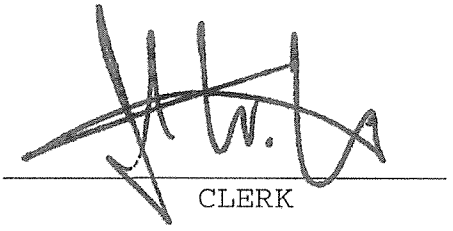

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Lippman, P.J., Mazzarelli, Williams, Buckley, Renwick, JJ.

4444 Kinder Morgan Energy Partners, L.P., et al., Index 104217/07

Plaintiffs-Respondents,

-against-

Ace American Insurance Company,
Defendant-Appellant.

O'Melveny & Myers LLP, New York (Paul R. Koepff of counsel), for appellant.

Baker & McKenzie LLP, Chicago, Il (Lindsay A. Philiben, of the Illinois Bar, admitted pro hac vice, of counsel), for respondents.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered February 5, 2008, which denied defendant's motion to the extent it sought dismissal or a stay of this declaratory judgment action on grounds of forum non conveniens, unanimously reversed, on the law, the facts and in the exercise of discretion, without costs, the motion granted and the complaint dismissed on condition that defendants waive any statute of limitations defense in California.

Plaintiffs seek a declaration of rights under insurance policies issued by defendant in connection with coverage for a pipeline explosion in California. In determining whether to dismiss an action on the ground of forum non conveniens, "[a]mong the factors to be considered are the burden on the New York

courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit. The court may also consider that both parties to the action are nonresidents and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction" (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984, citations omitted], *cert denied* 469 US 1108 [1985]).

The explosion caused physical damage in California, involved the alleged negligence of plaintiffs and nonparties there, and all of the underlying actions are pending in California, the residence of plaintiff SFPP. These facts support deference to California's stronger interest (*see Flintkote Co. v American Mut. Liab. Ins. Co.*, 103 AD2d 501 [1984], *affd* 67 NY2d 857 [1986]). That the subject policies were issued in New York is but one factor to be considered (*see Continental Ins. Co. v AMAX Inc.*, 192 AD2d 391 [1993], *lv denied* 82 NY2d 835 [1993]).

Moreover, plaintiffs' claims are based on a contract allegedly requiring the procurement of insurance. The existence and terms of that contract are relevant to a determination of

coverage, and the location of witnesses and documents concerning the contract, which was negotiated in and subject to the laws of California, is relevant.

THIS CONSTITUTES THE DECISION AND ORDER
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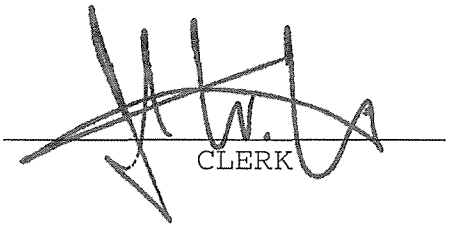


Lippman, P.J., Mazzarelli, Williams, Buckley, Renwick, JJ.

4445 The People of the State of New York, Ind. 6323/06
Respondent,

-against-

Rothwell Reddick,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (James A. Yates, J.), rendered on or about August 2, 2007, unanimously affirmed.

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

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

Denial of the application for permission to appeal by the

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

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

ENTERED: OCTOBER 30, 2008

CLERK

Lippman, P.J., Mazzarelli, Williams, Buckley, Renwick, JJ.

4446-
4447 Azimut-Benetti S.p.A., Index 602920/05
Plaintiff-Appellant-Respondent,

-against-

Magnum Marine Corporation, et al.,
Defendants-Respondents-Appellants.

Goldberg Segalla LLP, Buffalo (Richard A. Braden of counsel), for appellant-respondent.

Pavia & Harcourt, LLP, New York (Adam D. Mitzner of counsel), for respondents-appellants.

Orders, Supreme Court, New York County (Karla Moskowitz, J.), entered July 11, 2007, which denied defendants' motion for summary judgment dismissing the complaint, and denied in part plaintiffs' motion to compel disclosure, unanimously modified, on the law, to grant the motion for summary judgment, and the appeal otherwise dismissed as academic, without costs. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiff seeks to enforce a two-page "preliminary contract," drafted by its chairman, to purchase the assets of defendant Magnum, a manufacturer of luxury power yachts, from defendant Theodoli, Magnum's president, CEO and sole stockholder, for $10 million. The preliminary contract, as translated from Italian, states that the parties "bind themselves to sign a final

contract and to execute the sale within 90 days from today . . . binding themselves to create any ulterior contract, declaration and writing necessary or useful to produce the effect foreseen by the present preliminary." At the bottom of the writing Theodoli wrote by hand "Agreed to in principal [*sic*] subject to approval by my attorney -- the salary/remuneration is in exchange for 10 working days" (a clause in the typed portion of the preliminary contract called for an "emolument" of $100,000 yearly for four years). Plaintiff admits that it never received any communication from any lawyer for defendants approving the preliminary contract, but asserts that circumstances, including the preparation of a draft license agreement by defendants' attorney, "lead[] to the conclusion that [defendants'] attorney approval was initially attained" within the time contemplated by the preliminary contract and that there was "never any clear indication that said approval was ever withheld" in the aftermath of preliminary contract. Based on these circumstances, plaintiff allegedly began performance of the preliminary contract and presently seeks disclosure of communications between defendants and their attorneys.

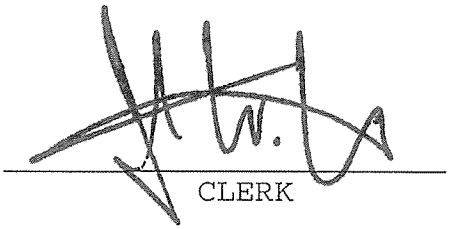
We hold that defendants' attorney's approval of the preliminary contract within the stipulated 90-day period was a

condition precedent to the formation of a binding contract (*see Trout Acquisition Corp. v Penn Cent. Corp.*, 156 AD2d 298, 299 [1989]), and find that such approval was never obtained. This conclusion is reinforced by the language calling for a "final contract" and indeed the very denomination of the contract as "preliminary" (*see Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 297 [2003]). While Theodoli's e-mails to Vitelli conveyed optimism concerning the likelihood and imminence of attorney approval, they did not suggest that approval had been obtained, and indeed persisted in the necessity of such approval. Defendants' attorney's preparation of a draft licence agreement, rather than an asset purchase agreement suggests, if anything, disapproval of the preliminary contract. Nor is there merit to plaintiff's other causes of action. There can be no valid claim of implied contract or promissory estoppel where the purported contract indicates a lack of intent to be bound (*see Prestige Foods v Whale Sec. Co.*, 243 AD2d 281 [1997]; *Steele v Delverde S.R.L.*, 242 AD2d 414, 415 [1997] [promise must be "clear and unambiguous"]), and a contract cannot be implied where there is an express contract covering the same subject matter (*see Julien J. Studley, Inc. v New York News*, 70 NY2d 628, 629 [1987]).

Nothing in the record suggests bad faith on defendants' part. In view of the foregoing, the balance of the appeal relating to disclosure is academic.

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

ENTERED: OCTOBER 30, 2008



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Lippman, P.J., Mazzarelli, Williams, Buckley, Renwick, JJ.

4448 Norberto Aponte, Index 15687/04
Plaintiff-Respondent,

-against-

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

New York City School Construction Authority, et al.,
Defendants.

Rubin, Fiorella & Friedman, LLP, New York (Shelley R. Halber of counsel), for appellants.

Bader Yakaitis & Nonnenmacher, LLP, New York (Robert E. Burke of counsel), for respondent.

Order, Supreme Court, Bronx County (Janice L. Bowman, J.), entered May 7, 2007, which granted plaintiff's motion for partial summary judgment on the issue of liability on his cause of action under Labor Law § 240(1) as against defendants City of New York and City of New York Department of Design and Construction, and denied such motion as against defendant O'Brien Kreitsberg, Inc. (OBK), unanimously affirmed, without costs.

Defendants' failure to provide adequate safety devices and to properly secure the ladder was a contributing cause of the accident. Plaintiff's conduct, at most, constituted comparative

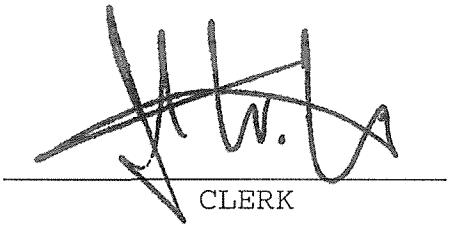
negligence, which is not a defense under Labor Law § 240(1) (*see Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173 [2004]; *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289 [2002]).

Regarding the court's denial of plaintiff's motion for partial summary judgment as against OBK, the "construction manager" for the project, plaintiff did not cross-appeal from this ruling (*see* CPLR 5515). In any event, given the existence of factual issues concerning the scope of the construction manager's oversight and control of the work, the motion court's ruling was appropriate (*see e.g. Walls v Turner Constr. Corp.*, 4 NY3d 861, 863-864 [2005]).

We have considered defendants' remaining contentions, including that the motion was premature in light of the need for further discovery, and find them unavailing. Plaintiff's request to strike material from the record on appeal is denied.

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

ENTERED: OCTOBER 30, 2008



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Lippman, P.J., Mazzarelli, Williams, Buckley, Renwick, JJ.

4449 Juan Renjifo, et al., Index 14268/05
Plaintiffs-Respondents,

-against-

Bay Shore Estadio Restaurant, Inc.,
Defendant-Appellant,

Kermit Kurbanali, et al.,
Defendants.

Hoffman & Roth, LLP, New York (Jayne F. Monahan of counsel), for appellant.

Luis Guerrero, New York, for respondents.

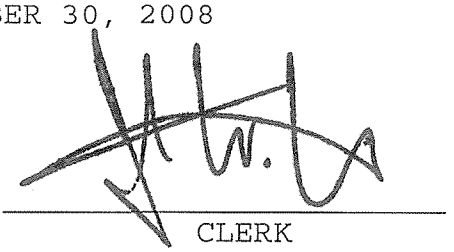
Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered on or about May 21, 2008, which, in an action for personal injuries allegedly sustained as a result of a slip and fall on snow, denied defendant Bay Shore Estadio Restaurant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff testified that a portion of the sidewalk in front of defendant's restaurant had been cleared and that there were approximately four to six inches of snow in the area where he slipped and fell. Defendant's owner could not recall what efforts he took regarding snow removal on the date of plaintiff's accident and his testimony as to his general snow removal practice was confirmed by plaintiff's testimony that the area

where he fell near the curb had more snow than the rest of the otherwise shoveled sidewalk. Accordingly, triable issues of fact exist regarding whether defendant's snow removal efforts created or exacerbated a dangerous condition (*see Prenderville v International Serv. Sys.*, 10 AD3d 334, 337-338 [2004]; *Jiuz v City of New York*, 244 AD2d 298 [1997]).

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

ENTERED: OCTOBER 30, 2008



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Lippman, P.J., Mazzarelli, Williams, Buckley, Renwick, JJ.

4450 The People of the State of New York, Respondent, Ind. 5367/05

-against-

Wallace Stevenson, Defendant-Appellant.

Ronald S. Nir, Kew Gardens, for appellant.

Robert M. Morgenthau, District Attorney, New York (Aaron Ginandes of counsel), for respondent.

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered March 23, 2007, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree and criminal possession of a weapon in the third degree, and sentencing him to an aggregate term of 5 years, unanimously affirmed.

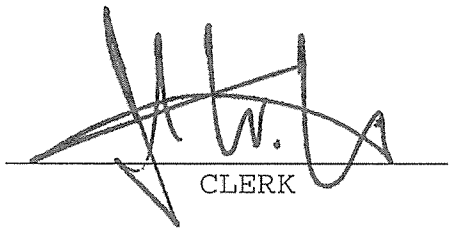
The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). Police officers responded to an anonymous report that there was an undescribed man with a gun a block away from their location. Almost immediately, they observed defendant, who was running toward them from the described location, looking over his shoulder, and carrying a

clear bag that contained what appeared to be possible narcotics packaging material. At this point, the police had ample basis for a level two common-law inquiry (*see People v De Bour*, 40 NY2d 210, 223 [1976]). When an officer tried to block defendant's path and get him to stop, this did not transform the inquiry into a seizure requiring reasonable suspicion (*see People v Rodriguez*, 49 AD3d 431 [2008], *lv denied* 10 NY3d 964 [2008]; *People v Cherry*, 30 AD3d 185, 185-186 [2006], *lv denied* 7 NY3d 811 [2006]; *People v Grunwald*, 29 AD3d 33, 38-39 [2006], *lv denied* 6 NY3d 848 [2006]). Defendant refused to stop, continued running, threw the bag over the officer's head and crashed into him, resulting in a struggle. At this point, the totality of the chain of events provided reasonable suspicion of criminality, warranting a frisk that revealed a firearm. It is of no moment that defendant's flight was toward the officer, in an effort to get past him, especially since defendant was also discarding the bag; defendant was clearly attempting to evade the officer and distance himself from possible contraband (*see People v Wigfall*, 295 AD2d 222 [2002], *lv denied* 99 NY2d 540 [2002]; *see also People v Wells*, 14 AD3d 320 [2005], *affd* 7 NY3d 51 [2006]). In addition, the bag, which was later found to contain cocaine, was

legally seized after defendant abandoned it (*see People v Reyes*, 83 NY2d 945 [1994]). Accordingly, there is no basis for suppression of the weapon, the drugs, or defendant's post-arrest statements.

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

ENTERED: OCTOBER 30, 2008



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Lippman, P.J., Mazzarelli, Williams, Buckley, Renwick, JJ.

4451N Benedetto Lamarca, et al., Index 601973/04
Plaintiffs-Respondents,

-against-

The Great Atlantic and Pacific Tea Company, Inc., doing business as A&P, The Food Emporium and Waldbaum's,
Defendant-Appellant.

Fulbright & Jaworski L.L.P., New York (Neil G. Sparber and India DeCarmine of counsel), for appellant.

Outten & Golden LLP, New York (Piper Hoffman of counsel), for respondents.

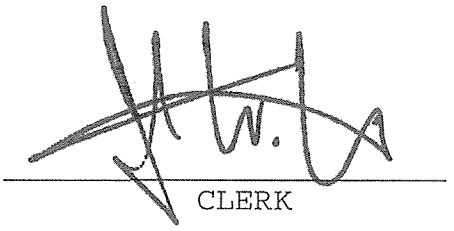
Order, Supreme Court, New York County (Herman Cahn, J.), entered July 10, 2007, which, insofar as appealed from as limited by the brief, granted plaintiffs' motion for class certification, unanimously affirmed, without costs.

The named plaintiffs' claim that they were not paid for overtime work is typical of the claims of the class, as it arises out of the same course of conduct, i.e., that, as a result of the pressure defendant placed on individual store managers to keep payroll costs down, in conjunction with its express policy forbidding off-the-clock work and mandating payment of overtime, stores were chronically understaffed and employees were permitted, or pressured, to work overtime without compensation

(*see Pruitt v Rockefeller Center Properties, Inc.*, 167 AD2d 14, 22 [1991]). Questions of law or fact common to the class will predominate over questions that affect only individual members, because defendant conceded that all its stores are managed pursuant to uniform policies set by it and that the corporate policies that drove managers to deprive employees of overtime pay were in effect for all the stores during the class period (*see Pesantez v Boyle Envtl. Servs.*, 251 AD2d 11, 12 [1998]). Defendant's attack on the adequacy of the named plaintiffs to serve as class representatives raises minor and collateral issues of impeachment that are insufficient to disqualify a class representative (*see Pruitt*, 167 AD2d at 25).

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

ENTERED: OCTOBER 30, 2008



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Tom, J.P., Friedman, Nardelli, Catterson, Moskowitz, JJ.

3129-
3130 Hugh Gallagher, et al., Index 400957/05
Plaintiffs-Appellants-Appellants, 591164/06

-against-

The New York Post, et al.,
Defendants-Respondents-Respondents.
- - - - - - - -
NYP Holdings, Inc.,
Third-Party Plaintiff-Respondent-Appellant,

-against-

Francis A. Lee Co.,
Third-Party Defendant-Appellant-Respondent.

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for Gallagher appellants-appellants.

Jones Hirsch Connors & Bull P.C., New York (Richard Imbrogno of counsel), for The New York Post and NYP Holdings, Inc., respondents-respondents/NYP Holdings, Inc., respondent-appellant.

French & Rafter, LLP, New York (Howard K. Fishman of counsel), for Francis A. Lee Co., appellant-respondent.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered August 17, 2007, which, insofar as appealed from as limited by the briefs, upon reargument, adhered to its prior order denying plaintiffs' motion for summary judgment on the issue of liability on their Labor Law § 240(1) cause of action, and vacated its determination granting so much of the cross motion of defendants The New York Post and NYP Holdings, Inc.

(collectively NYP) for summary judgment dismissing plaintiffs' Labor Law § 200 claim and reinstated the claim, and which denied the motion of third-party plaintiffs NYP for summary judgment on the first cause of action in the third-party complaint for conditional contractual indemnification against third-party defendant Francis A. Lee Co. (Lee), and which denied Lee's motion to sever the third-party action and its cross motion for summary judgment dismissing the third-party complaint, and which granted NYP and Lee's motions to strike the note of issue filed by plaintiffs, modified, on the law, NYP's cross motion for summary judgment granted to the extent of dismissing plaintiffs' claim pursuant to Labor Law § 200, NYP's motion for summary judgment granted on its first cause of action in the third-party complaint for conditional contractual indemnification, and Lee's cross motion for summary judgment granted to the extent of dismissing the second cause of action in the third-party complaint for breach of the contract to procure insurance, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered January 10, 2007, dismissed, without costs, as superseded by the appeal from the subsequent order.

Initially, we find that the motion court properly denied plaintiffs' motion for summary judgment on the Labor Law § 240(1) cause of action, albeit for the reasons it initially adopted, and

then rejected, on reargument. Labor Law § 240(1), commonly referred to as the Scaffold Law, provides, in pertinent part, that:

> "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

The Court of Appeals has long and repeatedly observed that the purpose of the statute is to protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs, on the owners and general contractors, instead of on the individual workers who are not in a position to protect themselves (*Martinez v City of New York*, 93 NY2d 322, 325-326 [1999]; *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985]; *Koenig v Patrick Constr. Corp.*, 298 NY 313, 318 [1948]). Consistent with this objective, the Court of Appeals has stated that the statute is to be construed as liberally as necessary to accomplish the purpose for which it was framed (*Panek v County of Albany*, 99 NY2d 452, 457 [2003]; *Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]), but has also cautioned that not every worker who falls at a construction site,

nor every object that falls on a worker, gives rise to an award of damages under Labor Law § 240(1) (*Abbatiello v Lancaster Studio Assoc.*, 3 NY3d 46, 50 [2004]; *Blake v Neighborhood Housing Servs. of N.Y., Inc.*, 1 NY3d 280, 288 [2003]). Accordingly, it is still necessary for a plaintiff to demonstrate that the statute was violated, and that the violation proximately caused his/her injuries (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Quattrocchi v F.J. Sciame Constr. Corp.*, 44 AD3d 377, 381 [2007], *affd* __ NY3d __, 2008 NY Slip Op 06736 [2008]). Thus, where a plaintiff's own actions are the sole proximate cause of the accident, liability under Labor Law § 240(1) does not attach (*Robinson v East Med. Ctr. LP*, 6 NY3d 550, 554 [2006]; *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d at 39). Moreover, if adequate safety devices are made available to the worker, but the worker does not use, or misuses, them, there is no liability (*Robinson*, 6 NY3d at 554-555; *Tonaj v ABC Carpet Co., Inc.*, 43 AD3d 337, 338 [2007]), and "[t]he burden of showing that an elevation-related risk exists, and that the owner or contractor did not provide adequate safety devices, falls upon the plaintiff" (*Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 681 [2007]).

In this matter, we are compelled to disagree with the dissent's conclusion that "there is simply no evidence of record

that the plaintiff chose not to use an available safety device." Jonathan Schreck, plaintiff's employer's assistant project manager, testified at a deposition conducted on January 31, 2006, that: he had weekly meetings with the safety specialist hired to oversee the construction project in question; the ironworkers were required to use certain safety devices, such as lanyards, cables or harnesses, when working near open areas; the devices were used to prevent injury in case a worker fell through an opening or off an elevated surface; the safety devices were available on the job site the day plaintiff was injured; and a standing order was in place that all workers operating around any opening in the floor were to be in a harness and tied off.

In our view, the foregoing testimony, which directly contradicts that of plaintiff, his co-worker, and the project foreman, consists of more than "[m]ere generic statements of the availability of safety devices"[1] and is sufficient, at this juncture, to raise issues of fact as to whether plaintiff was provided with adequate safety devices, was instructed to use them, and declined to do so, rendering his actions, or lack

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[1]Indeed, Mr. Schreck testified, in a manner indicating a good deal of familiarity with the safety devices, as to the various types of safety harnesses that were made available to the ironworkers, as well as the details of their operation, rendering his testimony somewhat more than generic statements.

thereof, the sole proximate cause of his injuries. We are not convinced, however, that even if plaintiff's grip was not up to full strength as a result of a prior unrelated injury, that such weakness could be considered the sole proximate cause of the accident.

The court erred in reinstating the Labor Law § 200 claim, where the evidence establishes that NYP did not exercise the requisite degree of control over plaintiff's work that would give rise to liability (*see Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 272 [2007], *lv denied* 10 NY3d 710 [2008]). That NYP retained a project manager for day-to-day monitoring of the project does not warrant a different conclusion (*see Aragon v 233 W. 21st St.*, 201 AD2d 353, 354 [1994]).

NYP was entitled to summary judgment on the first cause of action in the third-party complaint for conditional contractual indemnification, since any negligence giving rise to the accident, i.e., the purported failure to provide safety harnesses, arises out of the work performed by plaintiff's employer, Lee. Moreover, contrary to Lee's position, the anti-subrogation rule is only applicable to bar claims for indemnification to the extent of the limits of a common policy (*see Federated Dept. Stores, Inc. v Twin City Fire Ins. Co.*, 28 AD3d 32, 40 [2006]). By virtue of the "other insurance" language

of the umbrella policy obtained by Lee, the primary policy obtained by NYP is not a common policy, since Lee is not an insured under that policy. Thus, NYP's primary policy would attach prior to the umbrella policy, and accordingly, it is entitled to contractual indemnification for any damages awarded in excess of $1,000,000 and below $3,000,000.

The evidence further establishes that Lee did obtain the requisite insurance under its contract with NYP and thus, the second cause of action in the third-party complaint for failure to procure insurance should have been dismissed.

Inasmuch as this determination disposes of liability issues with regard to the third-party action, it does not appear that there should be any outstanding discovery. Any discovery regarding damages has presumably been shared between the parties to the third-party action, who are being provided a defense by the same carrier. Therefore, unless Lee can establish a need for further discovery, discovery should be closed, and severance of the third-party action is unnecessary.

All concur except Catterson and Moskowitz, JJ. who dissent in part in a memorandum by Catterson, J. as follows:

CATTERSON, J. (dissenting in part)

The plaintiffs' motion for summary judgment on the Labor Law § 240(1) cause of action should have been granted, since there are no triable issues regarding whether the requisite safety equipment was made available, and, if so, whether the injured the plaintiff chose not to make use of it. See Montgomery v. Federal Express Corp., 4 N.Y.3d 805, 806, 795 N.Y.S.2d 490, 828 N.E.2d 592 (2005). It is uncontested that while the plaintiff was cutting through steel decking with a gas-powered circular cut-off saw, the saw became bound up in the decking. At that point, the moment of inertia of the saw relative to the captured saw blade caused the plaintiff to be thrown a distance of approximately 14 feet into an opening in the floor whereupon he was injured. He testified that he was not provided with any safety devices. This was corroborated by the affidavit of the plaintiff's co-worker, the testimony of the plaintiff's own foreman, and the employee sign-in sheet. The plaintiff made out a prima facie case that he was not supplied with safety devices adequate to prevent him from being propelled into an open hole.[1] The burden then shifts to the defendant to establish that, "there was no statutory

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[1]It is noted, as the majority points out, that even if the plaintiff's grip was not up to full strength as a result of a prior unrelated injury, such weakness could not be considered the sole proximate cause of the accident.

violation and that plaintiff's own acts and omissions were the sole cause of the accident." Blake v. Neighborhood Hous. Servs. of N.Y. City, 1 N.Y.3d 280, 289, 771 N.Y.S.2d 484, 489, 803 N.E.2d 757 n 8 (2003).

We once again must observe that this is not merely a negligence action, that the Labor Law and decisional authority impose a greater burden on the defendants, and that public policy protecting workers requires that the statutes in question be construed liberally to afford the appropriate protections to the worker.

Thus, to defeat summary judgment in this case based on violations of the Labor Law, the defendant would necessarily have to establish that the plaintiff "had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured." Cahill v Triborough Bridge + Tunnel Auth., 4 N.Y.3d 35, 40, 790 N.Y.S.2d 74, 76, 823 N.E.2d 439, 441 (2004). The record fails to establish that there is an issue of material fact on several of the Cahill sole proximate cause factors.

Primarily, there is simply no evidence of record that the plaintiff chose not to use an available safety device. Indeed, every witness except FAL's assistant project manager, Jonathan J.

Schreck, testified that no safety devices were provided to the iron workers. At no point does Schreck specifically state that the plaintiff was told to use certain safety devices and that he declined and that he had "no good reason not to do so." Furthermore, the defendants point to no evidence of record that like the plaintiffs in Cahill and Blake, the plaintiff explicitly refused to use the available safety devices. See Quattrocchi v. F. J. Sciame Constr. Corp., 44 A.D.3d 377, 381-382, 843 N.Y.S.2d 564, 568 (1st Dept. 2007), aff'd _ N.Y.3d _, 2008 N.Y. Slip Op. 06736 (2008). Indeed, Schreck testified that the plaintiff's foreman was the best person to ask about the iron workers' use of safety devices. The foreman stated that no such devices were provided to the plaintiff. Mere generic statements of the availability of safety devices are insufficient to create an issue of fact that the plaintiff was the sole proximate cause of his injury.

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

ENTERED: OCTOBER 30, 2008

CLERK

Friedman, J.P., Williams, Catterson, Acosta, JJ.

3760 Philips South Beach, LLC, Index 103021/07
Plaintiff-Appellant,

-against-

ZC Specialty Insurance Company,
Defendant-Respondent.

Sukenik, Segal & Graff, P.C., New York (David C. Segal of counsel), for appellant.

Cahill Gordon & Reindel LLP, New York (Thorn Rosenthal of counsel), for respondent.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered October 3, 2007, which granted defendant's motion to dismiss the complaint, affirmed, with costs.

Dismissal of the complaint was appropriate where the parties' settlement agreement, which incorporated a release of any and all claims as between the parties, bars plaintiff's claims that its surety agreements with defendant mortgage insurer were unenforceable and void as against public policy on the basis that the agreements violated article 65 of the Insurance Law. Settlement agreements are judicially favored and may not be lightly set aside, and plaintiff's allegation that the settlement agreement was procured by duress is unsupported by allegations indicating that defendant's challenged conduct constituted a wrongful threat that effectively precluded plaintiff's ability to

exercise its free will (*see Matter of Guttenplan*, 222 AD2d 255, 256-257 [1995], *lv denied* 88 NY2d 812 [1996]). Instead, as correctly concluded by the motion court, defendant's challenged conduct constituted vigorous negotiation, and there was no evidence of unequal bargaining power between the parties (*see Fruchthandler v Green*, 233 AD2d 214 [1996]).

The record demonstrates that it was plaintiff's own actions, in initially refusing to pay defendant the agreed upon fees on the grounds that they were unenforceable and in prematurely seeking replacement financing, that led to the subject release. Plaintiff accepted the benefits of the settlement agreement to the extent it obtained a premature satisfaction of its existing mortgage to allow it to timely close with its new lender. This conduct constituted a ratification of the settlement agreement and undermines plaintiff's arguments that it executed the release solely out of duress, and that the agreement is void as against public policy (*see Khalid v Scagnelli*, 290 AD2d 352, 354 [2002]). Furthermore, plaintiff's failure to repudiate the settlement agreement in prompt fashion, as well as its acceptance of the benefits of the agreement, belies its claims of economic duress (*see Mendel v Henry Phipps Plaza W., Inc.*, 27 AD3d 375, 376 [2006]). In addition, it is unclear whether New York insurance law would govern the transaction, since plaintiff is an Illinois

limited liability company, defendant is incorporated in Texas, the loan closing took place in New Jersey, the reimbursement agreement is governed by Illinois law and the mortgaged property is in Florida.

All concur except Catterson, J. who dissents in a memorandum as follows:

CATTERSON, J. (dissenting)

I respectfully dissent because I believe that the motion court erred in granting defendant ZC Insurance Company's (hereinafter referred to as "ZC") CPLR 3211 motion to dismiss on the basis of a release that plaintiff alleged was obtained under economic duress. In my opinion, the motion court ignored precedent and well-established legal principles in determining, without a trial or evidentiary hearing or even adequate evidentiary material, that the plaintiff's allegation of economic duress lacked merit.

In this action, the plaintiff (Philips) seeks to recover damages arising out of an alleged illegal insurance contract to which it claims it was an unwitting party. The undisputed facts of the instant case are that, in 1999, Philips sought a loan to be secured by a mortgage for a property located in Florida known as The Shore Club Hotel. ZC agreed, for a fee, to provide mortgage insurance for Philips and successfully solicited Greenwich Capital Financial Product, Inc. (hereinafter referred to as "Greenwich") to loan Philips $81 million. The loan was secured by a mortgage on the property. As a condition for issuing the insurance, Philips and ZC signed a Reimbursement Agreement in which Philips agreed to pay ZC an annual surety premium and a termination premium. The loan was closed on or

about April 30, 1999, and the maturity date for the loan was June 1, 2006.

In or about early 2001, Philips sought to borrow more funds, and negotiated with Greenwich to restructure the loan as well as negotiating with ZC to modify the Reimbursement Agreement. In May 2001, the loan amount was increased to $104 million. In addition, both the terms of the Reimbursement Agreement and the annual surety premium were modified. On or about July 1, 2002, Philips again restructured the loan.

In 2005, Philips obtained replacement financing with a closing scheduled in early November 2005. In order to secure the replacement financing, Philips was required to repay, defease or assign the $104 million mortgage loan and obtain a satisfaction on the mortgage from the lender. Greenwich advised Philips that it would not provide a satisfaction unless ZC provided Greenwich with a notification stating that Philips had repaid all its debts to ZC. Subsequently, ZC demanded Philips pay approximately $1.5 million for the surety premium through June 1, 2006, plus approximately $5.2 million for the minimum final surety premium, and legal fee (together, hereinafter referred to as the "Demand Payment"). ZC also made it clear that it would not provide the required notification to Greenwich until Philips signed a settlement agreement containing a release. Philips eventually

paid the Demand Payment and signed the release.

On or around March 5, 2007, Philips filed an action in the Supreme Court, New York County for recovery of damages of more than $6 million, alleging that the mortgage insurance issued by ZC and the Demand Payment were obtained in violation of article 65 of the Insurance Law, and that the types of mortgage insurance sold by ZC to Philips was not permitted under Insurance Law 6503(a)(2) and (3). In addition, Philips alleged that ZC failed to seek the requisite approval on the premium rates from the Superintendent of Insurance, as required under Insurance Law 6504(a). Philips further contended that both the insurance and the settlement agreement at issue were void against public policy since they are illegal contracts under sections 6503(a) and 6504(a) of the Insurance Law.

ZC moved to dismiss the case pursuant to CPLR 3211(a)(1), (5) and (7). In support of the motion, ZC attached the settlement agreement containing the release signed by both parties in November 2005. In opposition, Philips filed an affidavit alleging that the release was signed under economic duress. Philips asserted that "[t]he terms and substance of the release were essentially non-negotiable. None of the agreements between plaintiff and defendant required plaintiff to deliver the release." In reply, ZC filed with the court, the 50-page

Reimbursement Agreement, which established the contractual relationship between the parties[1].

The court scheduled oral argument on the motion to dismiss during which ZC asserted that Philips's allegations of economic duress were conclusory, and that the burden was on Philips to raise a triable issue of fact[2]. Philips's counsel then attempted to present his client's case for a finding of economic duress. Subsequently, the motion court granted ZC's motion and dismissed the case, determining that the release was valid. The court held that the settlement agreement was obtained as a result of "vigorous bargaining tactics" and not a "wrongful threat" because Philips had received and accepted benefits from the exchange of the release. Thus, the court held that the release was not acquired under economic duress, and therefore it dismissed Philips's lawsuit.

For the reasons set forth below, I believe the motion court erred in granting ZC's motion to dismiss pursuant to CPLR

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[1]The affidavit of counsel refers to a defendant's reply memorandum of law that purportedly references this Reimbursement Agreement. However, that memorandum is not in the record before this Court, and in fact, nothing in the record before this Court indicates which provisions, if any, ZC relied on to counter Philips's contentions.

[2]Counsel for ZC apparently either forgot or misunderstood that the argument was on a motion to dismiss and not on a motion for summary judgment, and thus it was not incumbent on plaintiff to raise a "triable issue of fact."

3211(a)(1), (5) and (7). While it is well-established that a general release containing language that is clear and unambiguous will protect parties from lawsuits, duress, illegality, fraud or mutual mistake are causes sufficient to invalidate it. Mangini v. McClurg, 24 N.Y.2d 556, 563, 301 N.Y.S.2d 508, 513, 249 N.E.2d 386, 390 (1969). Moreover, a motion to dismiss should be denied where duress in the procurement of the release is alleged. See Newin Corp. v. Hartford Acc. & Indem. Co., 37 N.Y.2d 211, 217, 371 N.Y.S.2d 884, 889, 333 N.E.2d 163, 166 (1975); Gibli v. Kadosh, 279 A.D.2d 35, 40, 717 N.Y.S.2d 553, 556-557 (1st Dept. 2000); see also Anger v. Ford Motor Co., Dealer Dev., 80 A.D.2d 736, 437 N.Y.S.2d 165 (4th Dept. 1981) ("[w]here a complaint alleges fraud or duress in the procurement of a release . . . a motion to dismiss which is based solely on the release should be denied").

Here, it appears the motion court heard from both parties at oral argument as to the law on economic duress, and then summarily applied that law to facts not in evidence. The motion court determined that there was no economic duress because the settlement agreement resulted from vigorous bargaining tactics whereby Philips had accepted the benefit of ZC's permission to prematurely terminate the insurance contracts. However, that determination was made solely on the assertions of counsel and

without any testimony from witnesses, nor was it based on any contractual interpretation of the Reimbursement Agreement. For example, there was no testimony as to how and when the vigorous bargaining occurred. Nor was there any analysis of the relevant provisions of the Reimbursement Agreement.[3]

In my opinion, the motion court should have utilized CPLR 3211(c) and reserved the issue of the validity of the release for trial. See Art Stone Theat. Corp. v. Technical Programming & Sys. Support of Long Is., 157 A.D.2d 689, 549 N.Y.S.2d 789 (2nd Dept. 1990) (when plaintiff and defendant raise a issue on validity of a release pursuant to CPLR 3211 motion to dismiss, a separate trial should be conducted pursuant to CPLR 3211(c) on that issue.); see also Anger, 80 A.D.2d at 736, 437 N.Y.S.2d at 165 ("[b]ecause resolution of the issue of the validity of the release may well be dispositive of the entire matter . . . an evidentiary hearing pursuant to CPLR 3211(c) is directed").

Further, I believe that dismissal pursuant to CPLR 3211(a)(7) and CPLR 3211(a)(1) was not proper. In determining a motion which seeks to dismiss the action for failure to state a

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[3]For example, contrary to ZC's assertions before the motion court, certain provisions in the Reimbursement Agreement appear to indicate that a premature termination of the insurance contract with ZC was contemplated, and the method for calculating "discounted present value" appears to be outlined in some detail in Art. VII sec. 7.02 and Art. X sec. 10.03.

cause of action, the court must accept as true the allegations of the complaint, and give the non-moving party (Philips) the benefit of any reasonable inference in the light most favorable to it. Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d 409, 414, 729 N.Y.S.2d 425, 428, 754 N.E.2d 184, 187 (2001) (citing Tenuto v. Lederle Labs. Div. Of Am. Cyanamid Co., 90 N.Y.2d 606, 609-610, 665 N.Y.S.2d 17, 687 N.E.2d 1300 [1997] and Leon v. Martinez, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 974, 638 N.E.2d 511, 513 [1994]). To grant or deny a motion under CPLR 3211(a)(7), the court must determine whether the facts as alleged "manifest any cause of action cognizable at law." Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 185, 372 N.E.2d 17, 20 (1977). Whether a plaintiff (Philips) can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss. Id.; EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11, 19, 799 N.Y.S.2d 170, 175, 832 N.E.2d 26, 31 (2005).

In my opinion, Philips met its burden by pleading facts sufficient to support a cause of action for recovery of payment under an illegal contract (the insurance and the Reimbursement Agreement) pursuant to section 6408(c) and section 6503(a) of the Insurance Law. Indeed, ZC did not dispute any of the allegations; namely, that it is not a licensed mortgage insurer

under article 65 of the New York Insurance Law or that it failed to obtain approval from the Superintendent of Insurance of the State of New York for the amount charged by it.

Finally, it appears that ZC moved pursuant to 3211(a)(1) (dismissal on ground of documentary evidence) based on the same release it used as a ground for dismissal under CPLR 3211(a)(5). However, utilizing the release for an (a)(1) dismissal does not, in my opinion, help ZC either. A motion to dismiss based on documentary evidence requires that the document relied upon must definitely dispose of plaintiff's claim. See Farber v. Breslin, 47 A.D.3d 873, 876, 850 N.Y.S.2d 604, 608 (2nd Dept. 2008) ("documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law"); see also Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3211:10, at 22 (documentary evidence "apparently aims at paper whose content is essentially undeniable and which assuming the verity of its contents and the validity of its execution will itself support the ground on which the motion is based"). Clearly, in this case, such documentary evidence was not produced by ZC. The release did not refute any of Philips's allegations about the illegality of the contract, and certainly did not refute any allegation about the validity of the release itself.

I would therefore reverse the order of the motion court and reinstate the complaint.

M-1987 ***Philips South Beach, LLC v ZC Specialty Ins. Co.***

Motion seeking leave to strike portions of reply brief denied.

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

ENTERED: OCTOBER 30, 2008

CLERK

Mazzarelli, J.P., Catterson, McGuire, Acosta, Renwick, JJ.

4322 Dena S. Glynn, et al., Index 18909/03
Plaintiffs-Appellants,

-against-

George Hopkins,
Defendant-Respondent.

David Samel, New York, for appellants.

Koors & Jednak, Bronx (Sally Ann Zullo of counsel), for respondent.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered November 24, 2006, which granted defendant's motion for summary judgment dismissing the complaint, reversed, on the law, without costs, the motion denied and the complaint reinstated.

Defendant failed to make a prima facie showing that plaintiff Dena S. Glynn did not sustain a serious injury within the meaning of Insurance Law § 5102(d). Defendant's own examining neurologist reported finding limitations in plaintiff's ability to use the cervical area of her spine, which he quantified and causally related to the accident (*see generally Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350 [2002]; see Korpalski v. Lau, 17 AD3d 536, 537 [2005]). In addition, defendant's examining neurologist failed to set forth the

objective tests performed supporting his claims that there was no limitation of range of motion of the lumbar spine (*see id.* at 351; *Lamb v Rajinder*, 51 AD3d 430 [2008]). Also, defendant's radiologist's statement that "there are underlying degenerative changes suggesting that [a small central disk herniation at C4-C5] may be chronic in nature" is too equivocal to satisfy defendant's prima facie burden to show that such herniation was not caused by a traumatic event. In view of the foregoing, we need not consider plaintiff's opposition to the motion (*see Caballero v Fev Taxi Corp.*, 49 AD3d 387 [2008]).

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

McGUIRE, J. (dissenting)

Plaintiff Dena Glynn sustained personal injuries when the motor vehicle she was driving was struck by a vehicle driven by defendant. Plaintiff commenced this negligence action, predicated on multiple serious injury categories (Insurance Law § 5102[d]), against defendant to recover damages for disc injuries she allegedly sustained as a result of that accident.

Defendant moved for summary judgment dismissing the complaint, arguing, among other things, that plaintiff's injuries were not caused by the car accident. In support of his motion, defendant submitted plaintiff's deposition testimony in which she stated that she had sustained neck injuries in a 1993 car accident. Notably, plaintiff testified that she sustained a herniated disk at C5-C6 as a result of that prior accident. Plaintiff also injured her left knee in a 2001 slip and fall incident. Additionally, defendant also submitted the affirmation of a neurologist who noted both of the prior accidents, and a radiologist who reviewed MRI films taken of plaintiff's spine approximately four months after the accident involving defendant's vehicle. The radiologist noted that plaintiff had a herniated disk at C4-C5 and a bulging disk at C5-C6, and opined that:

"There is evidence of disc desiccation at both the C4-

C5 and C5-C6 levels. Disc desiccation indicates that the disc has dried out and lost its normal water content. A very small disc herniation is present at the C4-C5 level. The association of this disc herniation with underlying disc desiccation suggests that it is probably chronic in nature. Acute disc herniations usually occur in well-hydrated discs. It is the central, gelatinous portion of the disc which insinuates itself through the outer fibers of the disc to result in an acute disc herniation. Once this central, gelatinous portion dries up, the incidence of acute disc herniation rapidly diminishes.

"There are classic degenerative changes present at the C5-C6 level. There is disc space narrowing and disc bulging. Disc bulging is unrelated to trauma. Disc bulging occurs as the outer fibers of the disc ... lose their normal elasticity. This allows the central, more gelatinous portion of the disc to bulge circumferentially. This is the commencement of degenerative disc disease. Disc space narrowing occurs when there is loss of the internal architecture of the disc allowing it to collapse upon itself. There are anterior and posterior osteophytes. Osteophytes represent bony spurs which form off of the vertebral bodies. This represents actual bone formation and is chronic in nature. This is an attempt by the spine to stabilize itself in the setting of the degenerative process.

"In my opinion, [plaintiff] does have a small central disc herniation at the C4-C5 level. There are underlying degenerative changes suggesting that this may be chronic in nature. Classic degenerative changes unrelated to trauma are present at the C5-C6 level."

In opposition, plaintiff submitted the affirmation of her treating neurosurgeon. This physician noted that plaintiff "advised me that she had a history of some occasional neck pain and approximately 10 years ago was diagnosed with a herniated disc at C5-C6." The physician found that plaintiff had several

bulging discs and opined that her spinal injuries were "substantially caused" by the motor vehicle accident involving defendant.

Supreme Court granted defendant's motion and dismissed the complaint. The majority reverses and reinstates the complaint, finding that defendant did not meet his initial burden on his motion. Since I disagree with that conclusion and believe that Supreme Court correctly granted the motion, I respectfully dissent.

Defendant submitted evidence, including plaintiff's own deposition testimony, that she had sustained a neck injury to her C5-C6 disc several years before the accident giving rise to this action, and plaintiff now seeks to recover damages for disc injuries. Evidence of plaintiff's prior cervical spine injury coupled with the affirmation of defendant's radiologist, who opined that plaintiff's cervical spine injuries are degenerative, was sufficient to establish defendant's prima facie showing of entitlement to judgment as a matter of law (*see Becerril v Sol Cab Corp.*, 50 AD3d 261, 261 [2008] ["Defendants established a prima facie entitlement to summary judgment by submitting, inter alia, the affirmed report of a radiologist who opined that plaintiff's MRI films revealed degenerative disc disease, and no evidence of post-traumatic injury to the disc structures"]; *see*

also Ronda v Friendly Baptist Church, 52 AD3d 440, 441 [2008] ["Defendants carried their initial burden of showing that plaintiff's shoulder tendon tear and other injuries were not proximately caused by the subject accident, by submitting reports of plaintiff's previous line-of-duty injuries and the opinion of their examining orthopedist, based in part on the MRI report describing arthritic changes in the shoulder joint as degenerative, that the shoulder injury was among plaintiff's preexisting conditions"] [internal citation omitted]; *Figueroa v Castillo*, 34 AD3d 353, 353-354 [2006] ["Defendants' submissions included excerpts from plaintiff's deposition, as well as medical reports by plaintiff's doctors, and described another automobile accident one month before the subject accident, wherein she sustained similar knee and back injuries, and a fall on the same knee subsequent to the latest accident. These established additional contributing factors, interrupting the chain of causation between the subject accident and claimed injury, thereby shifting the burden of proof to plaintiff"]).

I disagree with the majority's conclusion that defendant's radiologist's opinions were equivocal. With respect to the C5-C6 disc, the expert clearly and unequivocally stated that "[c]lassic degenerative changes unrelated to trauma are present at the C5-C6 level." With respect to the C4-C5 disc, the radiologist asserted

that "[t]he association of th[e] [C4-C5] disc herniation with underlying disc desiccation suggests that it is probably chronic in nature," and that "[t]here are underlying degenerative changes [to that disc] suggesting that th[e] [injury] may be chronic in nature." While the radiologist did not state that her opinion in this regard was to a reasonable degree of medical certainty, her opinion has probative value nonetheless. The key inquiry in gauging whether an expert has expressed sufficient certainty in her opinion for it to have probative value is "whether it is 'reasonably apparent' that 'the doctor intends to signify a probability supported by some rational basis'" (*Matott v Ward*, 48 NY2d 455, 461 [1979], quoting *Matter of Miller v Natl. Cabinet Co.*, 8 NY2d 277, 282 [1960]). Based on the quoted language above from the radiologist's affirmation, it is reasonably apparent that she intended to signify that it was more likely than not that the C4-C5 disc injury was a degenerative condition. Unquestionably, moreover, she outlined her reasons for that conclusion, thereby providing a rational basis for it (*see McGrath v Irving*, 24 AD2d 236, 238 [1965], *lv denied* 17 NY2d 419 [1966] ["courts have come to permit . . . words such as 'possible' and 'probable' by the medical profession in expressing an opinion, providing, of course, there is a reasonable basis" for the opinion]).

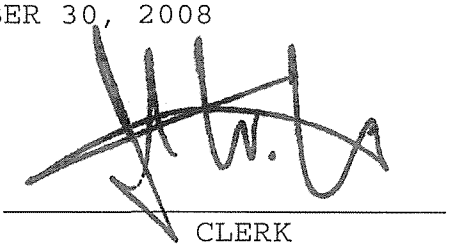
In opposition, plaintiff failed to raise a triable issue of fact since her expert failed to address how her "current medical problems, in light of her past medical history, are causally related to the subject accident" (*Style v Joseph*, 32 AD3d 212, 214 [2006]). The most glaring deficiency in plaintiff's opposition is that her expert did not discuss the prior cervical spine injury at all except to note that she had sustained it (*see Becerril*, 50 AD3d at 261-262 ["plaintiff conceded at his deposition that he sustained injuries to his neck and back in a prior accident, and an MRI conducted shortly after the subject accident showed degenerative disc disease. In these circumstances, it was incumbent upon plaintiff to present proof addressing the asserted lack of causation"]; *Brewster v FTM Servo, Corp.*, 44 AD3d 351, 352 [2007] ["Once a defendant has presented evidence of a pre-existing injury, even in the form of an admission made at a deposition, it is incumbent upon the

plaintiff to present proof to meet the defendant's asserted lack of causation"] [internal citation omitted]).

Accordingly, I would affirm the order.

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

ENTERED: OCTOBER 30, 2008



CLERK

Mazzarelli, J.P., Williams, Buckley, Renwick, JJ.

4435 Rita DiGiantomasso, Index 116932/05
Plaintiff-Respondent,

-against-

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

Judlau Contracting, Inc., et al.,
Defendants-Appellants.

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4436 Rita DiGiantomasso,
Plaintiff-Respondent,

-against-

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

Felix Associates, LLC,
Defendant-Appellant.

London Fischer LLP, New York (Daniel P. Mevorach of counsel), for Judlau Contracting, Inc., appellant.

Lewis, Johs, Avallone, Aviles, LLP, Melville (Michael G. Kruzynski of counsel), for Liro-Kassner, Inc., appellant.

Rubin, Fiorella & Friedman LLP, New York (Shelley R. Halber of counsel), for Felix Associates, LLC, appellant.

Friedman & Moses, LLP, New York (I. Bryce Moses of counsel), for respondent.

Orders, Supreme Court, New York County (Eileen A. Rakower, J.), entered December 5, 2007 and January 9, 2008, which, in an action for personal injuries sustained in a trip and fall allegedly caused by a raised manhole cover in a street

intersection, denied defendants-appellants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff filed a notice of claim against defendant City, and, four months after the accident, at a General Municipal Law § 50-h examination, unequivocally testified that she had tripped over a manhole cover that was protruding approximately 2½ inches above the ground. Plaintiff and the City were the only parties present at the section 50-h examination, and it is undisputed that no notice thereof was given to defendants-appellants, a contractor who had allegedly performed a water main installation in the intersection, and a contractor and resident engineer for a street resurfacing project that had allegedly included the intersection. At a deposition held almost three years after the accident, plaintiff testified that she was unable to say with certainty that she knew, on the day of the accident, that she had tripped over a manhole cover, but rather made that determination with certainty when she returned to the scene of the accident three weeks after the accident, and although she may have made that determination before the day she returned three weeks later, perhaps even as early as the day of the accident, she could not say for sure.

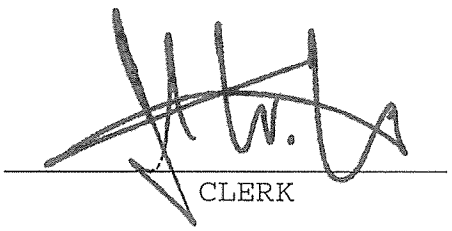
Appellants argue that plaintiff's section 50-h testimony is

hearsay as to them and therefore may not be considered for the purpose of identifying the cause of plaintiff's fall, in opposition to their motions for summary judgment (citing, inter alia, *Fernandez v VLA Realty, LLC*, 45 AD3d 391, 391 [2007] [defendants property owners entitled to summary judgment where plaintiff could not identify cause of fall at his deposition]). While appellants did not have the opportunity to cross-examine plaintiff at the section 50-h examination itself, their argument, which relies on *Claypool v City of New York* (267 AD2d 33 [1999] [plaintiffs' decedent's section 50-h testimony could not be used against defendants property owners where latter were not notified of section 50-h examination and did not take decedent's deposition before she died]), overlooks that appellants did have an opportunity to cross-examine plaintiff about her section 50-h testimony at her later deposition. But even if plaintiff's section 50-h testimony were deemed inadmissible hearsay as to appellants, it was not the only evidence that plaintiff offered on the issue of causation in opposition to appellants' motions, and it thus may be considered along with the admissible deposition testimony (*see Matter of New York City Asbestos Litig*, 7 AD3d 285, 286 [2004] ["evidence otherwise excludable at trial may be considered in opposition to a motion for summary judgment as long as it does not become the sole basis for the

court's determination"]). In order to survive appellants' motions for summary judgment, plaintiff was not required to state for certain that she knew exactly what she tripped over the very instant that she tripped over it. To the extent that plaintiff's deposition testimony in this regard was vague or inconsistent with her section 50-h testimony, a credibility issue is raised to be decided by the jury, not the court on a motion for summary judgment. Certainly, plaintiff's deposition testimony, in conjunction with her section 50-h testimony, is more than sufficient to identify a protruding manhole cover as the cause of her trip and fall; indeed, plaintiff's deposition testimony would be sufficient in that regard even if considered alone.

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

ENTERED: OCTOBER 30, 2008



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Tom, J.P., Nardelli, Sweeny, McGuire, DeGrasse, JJ.

4452 The People of the State of New York, Ind. 6527/05
Respondent,

-against-

Lafate Harris,
Defendant-Appellant.

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4453 The People of the State of New York,
Respondent,

-against-

Todd Smith,
Defendant-Appellant.

Center for Appellate Litigation, New York (Robert S. Dean of counsel), and Milbank, Tweed, Hadley & McCloy LLP, New York (Mehrnoush Bigloo of counsel), for Lafate Harris, appellant.

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

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

Judgments, Supreme Court, New York County (Richard D. Carruthers, J.), rendered February 16, 2007, convicting defendants, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third and fifth degrees, and sentencing each of them, as a second felony drug offender, to an aggregate term of 6 years, unanimously affirmed.

The court properly denied defendants' applications made

pursuant to *Batson v Kentucky* (476 US 79 [1986]). Regardless of whether hybrid groups are cognizable under *Batson*, defendants did not produce "evidence sufficient to permit the trial judge to draw an inference that discrimination ha[d] occurred" (*Johnson v California*, 545 US 162, 170 [2005]), and thus failed to make a prima facie showing that the prosecutor discriminated against white women in his exercise of peremptory challenges. The *Batson* claim only applied to the first of three rounds of jury selection, and the numbers of white women challenged by the prosecutor were too small to be significant (*see People v Johnson*, 37 AD3d 344 [2007], *lv denied* 8 NY3d 986 [2007]; *compare People v Rosado*, 45 AD3d 508 [2007]). Furthermore, there were no other facts or circumstances suggesting intentional discrimination.

The court properly denied defendants' mistrial motions, made on the ground that the prosecutor's summation contained allegedly improper references to drug dealers or the business of selling drugs. These remarks drew fair inferences from the evidence, as well as being responsive to defense efforts to show that defendants' behavior during this incident was not typical of drug dealers (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]). Defendants' other summation claims are unpreserved and we decline to review them in the interest of

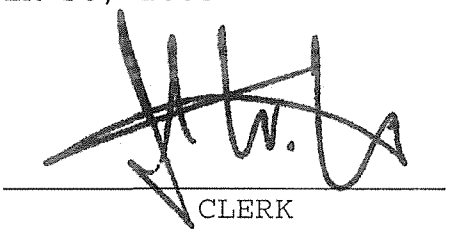
justice. As an alternative holding, we find no basis for reversal (*see id.*; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

The evidence established that a 20-dollar bill, which was part of the prerecorded buy money, was recovered from defendant Smith rather than from defendant Harris or anyone else, and there is no merit to Smith's claim to the contrary. Even though the officer who arrested Smith testified he recovered $20 from Smith's pocket, without specifying that it was a 20-dollar bill, the testimony of the officer who arrested Harris made it clear that this bill could only have come from Smith. Smith's claim that his conviction was against the weight of the evidence is likewise without merit (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

We perceive no basis for reducing the sentences.

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

ENTERED: OCTOBER 30, 2008



CLERK

Tom, J.P., Nardelli, Sweeny, McGuire, DeGrasse, JJ.

4454 In re Carthage Palace, Inc., Index 115926/07
Petitioner,

-against-

New York State Liquor Authority,
Respondent.

Mehler & Buscemi, New York (Martin P. Mehler of counsel), for petitioner.

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

Determination of respondent New York State Liquor Authority, dated November 28, 2007, which revoked petitioner's liquor license and directed forfeiture of its $1,000 bond, unanimously confirmed, the petition denied and this proceeding (transferred to this Court by order of Supreme Court, New York County [Marcy S. Friedman, J.], entered on or about January 4, 2008) dismissed, without costs.

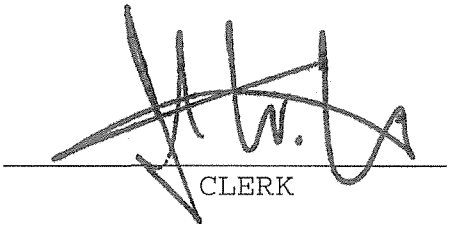
Respondent's conclusion that petitioner permitted an unauthorized person or persons to avail themselves of its liquor license is supported by substantial evidence (*see Matter of Happy Landing Lounge v State of New York Liq. Auth.*, 219 AD2d 786 [1995]). The testimony and evidence demonstrate that petitioner's owner and sole principal entered into a written agreement ceding control and promising profit to a third party.

Petitioner's principal remained absent from the premises following the takeover and adduced no evidence showing his continued involvement in the business, nor, at the very least, any indication that he continued to monitor the business.

Respondent's conclusions that petitioner's principal failed to appear for an interview as directed, and purchased alcohol from an unlicensed source, are based on credibility determinations by the Administrative Law Judge (*see Matter of Floral Park Liqs. v New York State Liq. Auth.*, 211 AD2d 499 [1995], *lv denied* 85 NY2d 806 [1995]), and we perceive no basis for disturbing them. In light of the nature of the offense, the penalty imposed is not shocking to our sense of fairness (*see Happy Landing Lounge*, 219 AD2d at 787 [1995]).

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

ENTERED: OCTOBER 30, 2008



CLERK

Tom, J.P., Nardelli, Sweeny, McGuire, DeGrasse, JJ.

4455-
4456 In re Alyssa M., and Another,

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

Carlos A., et al.,
Respondents-Appellants,

Saint Dominic's Home,
Petitioner-Respondent.

Michael S. Bromberg, Sag Harbor, for Carlos A., appellant.

Howard M. Simms, New York, for Milagros M., appellant.

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for respondent.

Steven Banks, The Legal Aid Society, New York (Judith Waksberg of counsel), and Proskauer Rose, LLP, New York (Stefanie M. Ramirez of counsel), Law Guardian.

Orders of disposition, Family Court, Bronx County (Carol A. Stokinger, J.), entered on or about September 8, 2006, which, inter alia, upon a finding that respondent mother permanently neglected the subject children and that respondent father had been given notice of the proceedings and an opportunity to be heard at the dispositional hearing, terminated the mother's parental rights and committed custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed,

without costs.

We note respondent mother does not challenge the finding of neglect. Moreover, the agency made diligent efforts, including developing a realistic plan for the mother, with which she failed to comply.

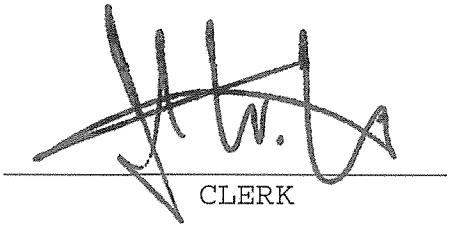
A preponderance of the evidence demonstrated that termination of the mother's parental rights was in the children's best interests, particularly given the children's expressed preference not to live with their biological parents (*see Matter of Elizabeth Amanda T.*, 44 AD3d 507 [2007]). The record affords no basis to conclude that the children's best interests would have been better served by a suspended judgment rather than termination of parental rights (*see Matter of Jazminn O'Dell P.*, 39 AD3d 235 [2007]; *Matter of Adante A.*, 38 AD3d 243 [2007]; *Matter of Donelle Thomas M.*, 4 AD3d 137 [2004]), and the court's determination was appropriate even if adoption would result in the separation of the children from each other and their half-siblings (*see Matter of Alpacheta C.*, 41 AD3d 285 [2007], *lv denied* 9 NY3d 812 [2007]).

The rights of the father, as a "notice father," were limited to notice of the proceeding and an opportunity to be heard concerning the children's best interests (Social Services Law § 384-c; *see also* Domestic Relations Law § 111), and contrary to

the father's contentions, he had ample opportunity to be heard on the issue. The record establishes that the father testified on several occasions during the proceedings, presented evidence as to the best interests of the children at the dispositional hearing, and that his attorney was permitted to participate during that hearing, including by making objections and cross-examining witnesses (*see e.g. Matter of Camperlengo v Barell*, 78 NY2d 674, 681 [1991]).

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

ENTERED: OCTOBER 30, 2008



CLERK

Tom, J.P., Nardelli, Sweeny, McGuire, DeGrasse, JJ.

4458 In re Tinel Bedford, etc., Index 100605/07
Petitioner,

-against-

Raymond W. Kelly, as Police Commissioner
of the City of New York, et al.,
Respondents.

Quinn & Mellea, LLP, White Plains (Andrew C. Quinn of counsel), for petitioner.

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

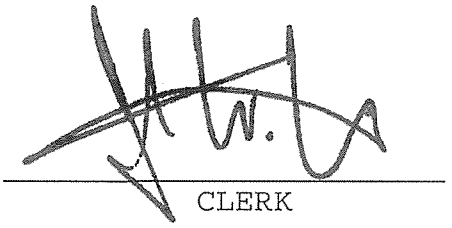
Determination of respondent Commissioner, dated September 15, 2006, which, after a hearing, imposed one year of probationary dismissal, suspension for 30 days and forfeiture of 30 vacation days, unanimously confirmed, the petition denied and this proceeding (transferred to this Court by order of the Supreme Court, New York County [Walter B. Tolub, J.], entered August 1, 2007) dismissed, without costs.

Substantial evidence supports the finding that petitioner engaged in conduct prejudicial to the good order, efficiency and discipline of the Police Department, utilized its computers for a non-Department or unauthorized use, and failed to supervise

properly the conduct of members of the service subordinate to him. The penalty imposed does not shock our sense of fairness (*see Matter of Kelly v Safir*, 96 NY2d 32, 39-40 [2001]).

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

ENTERED: OCTOBER 30, 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 30, 2008.

Present - Hon. Peter Tom, Justice Presiding
Eugene Nardelli
John W. Sweeny, Jr.
James M. McGuire
Leland G. DeGrasse, Justices.

The People of the State of New York, Ind. 37792C/05
Respondent,

-against- 4460

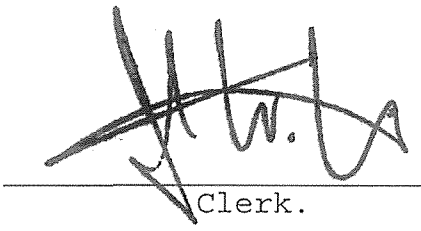
William Rivera,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (John S. Moore, J.), rendered on or about November 15, 2006,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTER:



Clerk.

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

Tom, J.P., Nardelli, Sweeny, McGuire, DeGrasse, JJ.

4463 Solomon Holding Corp., Index 111071/05
Plaintiff-Appellant,

-against-

Peter Golia, et al.,
Defendants-Respondents,

Sylvia Ann Rosenblatt, et al.,
Defendants.

Law Offices of Jay S. Markowitz, P.C., Kew Gardens (Jay S. Markowitz of counsel), for appellant.

Char & Herzberg LLP, New York (Edward M. Char of counsel), for respondents.

Order, Supreme Court, New York County (Rolando T. Acosta, J.), entered August 21, 2007, which, in an action to foreclose a mortgage, denied plaintiff's motion for summary judgment and granted defendants-respondents' cross motion to amend their answer so as to add the affirmative defense of statute of limitations and, upon amendment, for summary judgment dismissing the complaint, unanimously affirmed, without costs.

On appeal, plaintiff does not argue that the statute of limitations had not run before commencement of the action, but only that defendants should not be permitted to invoke the statute of limitations because they did not plead it in their answer and then waited 19 months before finally seeking to

interpose it. Plaintiff, however, does not show, or even claim, prejudice or surprise resulting directly from defendants' delay in asserting the statute of limitations. Absent such showing, defendants' cross motion to amend was properly granted (CPLR 3025[b]; *see Seda v New York City Hous. Auth.*, 181 AD2d 469 [1992], *lv denied* 80 NY2d 759 [1992], citing, inter alia, *Fahey v County of Ontario*, 44 NY2d 934 [1978]).

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

ENTERED: OCTOBER 30, 2008

CLERK

Tom, J.P., Nardelli, Sweeny, McGuire, DeGrasse, JJ.

4464 In re Colin W.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for Presentment Agency.

Order of disposition, Family Court, Bronx County (Juan M. Merchan, J.), entered on or about July 11, 2007, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he had committed acts which, if committed by an adult, would constitute the crimes of menacing in the second and third degrees, and placed him with the Office of Children and Family Services for a period of 12 months, unanimously modified, on the law, to the extent of vacating the finding as to menacing in the third degree and dismissing that count of the petition, and otherwise affirmed, without costs.

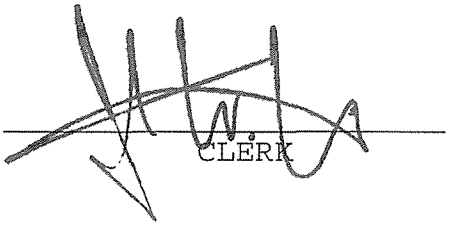
The court's fact-finding determination was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The finding that appellant intentionally placed the victim in

fear of physical injury by displaying what appeared to be a firearm (Penal Law § 120.14[1]) was supported by evidence that appellant, accompanied by a large group, approached the victim while holding his hand at chest level under his jacket, in a position that the victim demonstrated for the benefit of the trier of fact, and angrily asked the victim whether he was "messing with my brother," causing the victim to be fearful of a physical attack. The wind then blew open appellant's unzipped jacket, revealing that appellant actually was holding a pistol in his right hand with his finger on the trigger. Although the uncovering of the weapon by the wind was not a conscious display, appellant had already engaged in conduct satisfying the element of display of an apparent firearm, as that element has been interpreted in robbery cases under Penal Law § 160.15(4) involving the same element (*see People v Lopez*, 73 NY2d 214, 220-222 [1989]; *People v Baskerville*, 60 NY2d 374, 381-382 [1983]). Moreover, the position of appellant's hand and weapon as revealed by the wind gust permits an inference that the hand and weapon were positioned likewise just before the gust, which would have readily conveyed the impression that there was a firearm under the jacket.

The court should have dismissed the third-degree menacing count as a lesser included offense of second-degree menacing.

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

ENTERED: OCTOBER 30, 2008



Tom, J.P., Nardelli, Sweeny, McGuire, DeGrasse, JJ.

4465 Rachel L. Arfa, et al., Index 603602/05
Plaintiffs,

-against-

Gadi Zamir, et al.,
Defendants.
- - - - -
[And Other Actions]
- - - - -
Mintz, Levine, Cohn, Ferris,
Glovsky & Popeo, P.C.,
Intervenor-Plaintiff-Respondent,

-against-

546-552 West 146th Street LLC, et al.,
Intervenors-Defendants-Appellants.

Balber Pickard Maldonado & Van Der Tuin, P.C., New York (Stanley Chinitz of counsel), for appellants.

Simpson Thacher & Barlett, LLP, New York (Mark G. Cunha of counsel), for respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered April 30, 2008, which denied the motion of 546-552 West 146th Street LLC, 522-536 West 147th Street LLC, West 162nd Street and Academy Street LLC, 100-102 East 124th Street Package LLC, Harlem I LLC and Harlem II LLC (collectively, the Property LLCs) to dismiss the intervention action brought by Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C. (Mintz) to collect attorney's fees, unanimously modified, on the law, to dismiss Mintz's claim

for the fees and costs it incurred in the intervention action, and otherwise affirmed, without costs.

Mintz's breach of contract claims were correctly sustained since it cannot be determined as a matter of law that the written letters of engagement insufficiently explained the scope of the work allegedly performed by Mintz on behalf of the Property LLCs (*see* 22 NYCRR 1215.1). The factual allegations in Mintz's complaint and in its attorney's affirmation are not plainly contradicted by the letters (CPLR 3211[a][1]; *see Bishop v Maurer*, 33 AD3d 497 [2006], *affd* 9 NY3d 910 [2007]). Moreover, issues of fact exist whether the Property LLCs ratified the terms of the letters by making payment for services rendered by Mintz (*see Edison Stone Corp. v 42nd St. Dev. Corp.*, 145 AD2d 249, 253 [1989]).

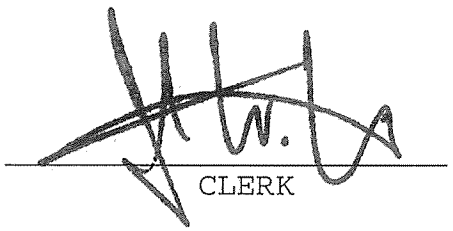
The claim for fees and costs incurred by Mintz in its collection action should have been dismissed because it is based on a provision in the written letters of engagement that is not enforceable due to its non-reciprocal character (*see Ween v Dow*, 35 AD3d 58 [2006]).

The cause of action for promissory estoppel was correctly sustained since the pleadings and counsel's affirmation allege a clear and unambiguous promise by the Property LLCs to pay for legal services rendered on their behalf by Mintz, Mintz's

reasonable reliance upon this promise in performing the requested legal work, and injury to Mintz by the Property LLCs' refusal to make payment on the invoices for legal services rendered (*see Urban Holding Corp. v Haberman*, 162 AD2d 230, 231 [1990]).

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

ENTERED: OCTOBER 30, 2008



CLERK

Tom, J.P., Nardelli, Sweeny, McGuire, DeGrasse, JJ.

4466 Margaret Ortiz, et al., Index 117087/03
Plaintiffs-Respondents, 590099/06
590402/06

-against-

New York Medical Group, P.C., et al.,
Defendants.

- - - - -

New York Medical Group, P.C.,
Third-Party Plaintiff-Respondent,

-against-

Allen H. Kapit, M.D.,
Third-Party Defendant-Appellant.

[And a Second Third-Party Action]

Charles E. Kutner, New York, for appellant.

Polin, Prisco & Villafane, Glen Cove (Sandra McIlveen of counsel), for Ortiz respondents.

McMahon, Martine & Gallagher, LLP, Brooklyn (Patrick W. Brophy of counsel), for New York Medical Group, P.C., respondent.

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered October 11, 2007, which denied third-party defendant Kapit's motion to dismiss the third-party complaint on the ground that third-party plaintiff New York Medical Group (NYMG) lacks capacity to sue, having been previously liquidated in bankruptcy, unanimously affirmed, without costs.

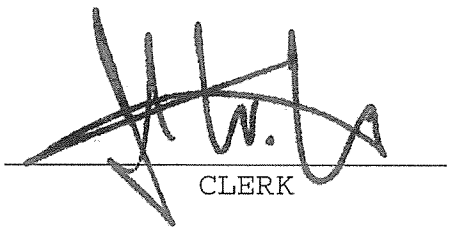
A liquidation proceeding is closed only when a final decree is entered (*Seinfeld v Allen*, 169 Fed Appx 47, 49 [2d Cir 2006]).

NYMG knew of the claim against it by plaintiffs before the bankruptcy was closed, and cannot assert that it could not have included as an asset in the bankruptcy estate the claim it possessed against third-party defendant Kapit (*see Dynamics Corp. of Am. v Marine Midland Bank-N.Y.*, 69 NY2d 191, 196-197 [1987]; *Barranco v Cabrini Med. Ctr.*, 50 AD3d 281 [2008]). If a claim owned by a bankrupt is of value, his creditors are entitled to it, and he cannot, by withholding knowledge of its existence from the trustee, obtain a release from his debts and still assert title to -- and collect upon -- the claim for his own benefit (*see First Natl. Bank v Lasater*, 196 US 115 [1905]). However, this third-party claim against Dr. Kapit sounds in indemnification, and any recovery against NYMG, an empty shell without assets, must necessarily be paid by insurance, if at all; the indemnification claim thus could not have benefitted the bankruptcy estate of NYMG because it was not an asset of that estate (*see* 11 USC § 541[b][1]). Unlike in *Dynamics Corp.* and *Barranco*, this claim against third-party defendant does not belong to the estate. NYMG was not "discharged" (11 USC § 1141[d][3]), but remains a liquidated company. Accordingly, its status is akin to a dissolved corporation winding up its affairs, and as such it has the capacity to bring the third-party claim in

its individual capacity (*see Tedesco v A.P. Green Indus., Inc.*, 8 NY3d 243 [2007]).

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

ENTERED: OCTOBER 30, 2008



CLERK

Tom, J.P., Nardelli, Sweeny, McGuire, DeGrasse, JJ.

4467 Chelsea Crucen, an Infant, by Erenia Vargas, etc., Plaintiff-Appellant,

-against-

Linda Leary, M.D., et al., Defendants-Respondents.

Index 20213/05

Scaffidi & Associates, New York (Robert M. Marino of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (John O'Sullivan of counsel), for Linda Leary, M.D. and New York Presbyterian Hospital, respondents.

Schiavetti, Corgan, DiEdwards & Nicholson, LLP, New York (Samantha E. Quinn of counsel), for Dina Kornblau, M.D., Gayatri Vasudevan, M.D. and Susanna Jalkut, M.D., respondents.

McAloon & Friedman, P.C., New York (Timothy J. O'Shaughnessy of counsel), for Diana Aschettino-Manevitz, M.D. and Montefiore Medical Center, respondents.

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for St. Barnabas Medical Hospital, respondent.

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered April 17, 2007, which granted defendants' motions and cross motions to dismiss the complaint, and denied plaintiffs' cross motion to amend the complaint or dismiss without prejudice, unanimously affirmed, without costs.

Plaintiffs sued for medical malpractice arising from vaccinations the infant plaintiff received at defendant hospitals

in 2000 and 2001. The individual defendants are alleged, among other things, to have administered the vaccines, failed to treat properly the conditions arising subsequent to the vaccinations, or failed to obtain informed consent.

Defendants moved to dismiss the complaint based on the National Childhood Vaccine Injury Act of 1986 (NCVIA, Pub L 99-660, tit III), which provides a no-fault compensation program for "vaccine-related injury or death" (42 USC § 300aa-15[a]). Under NCVIA no person may institute a civil action in state or federal court for damages in excess of $1,000 against a "vaccine administrator or manufacturer" arising from a "vaccine-related injury or death associated with the administration of a vaccine," and no court may award damages in excess of $1,000 unless a petition has been filed for compensation under the National Vaccine Injury Compensation Program (*see* § 300aa-11[a][2][A]). If such a civil action is filed in state or federal court, the court must dismiss the action (*see* § 300aa-11[a][2][B]).

Plaintiffs admit they did not file a petition for compensation under NCVIA. Given the clear mandate of the statute, the court had no choice but to dismiss the complaint. Plaintiffs' bill of particulars alleged that each defendant either directly administered covered vaccines or treated plaintiff for injuries that arose shortly thereafter and are

attributed to the vaccinations. Therefore, they are "vaccine administrators" under NCVIA.

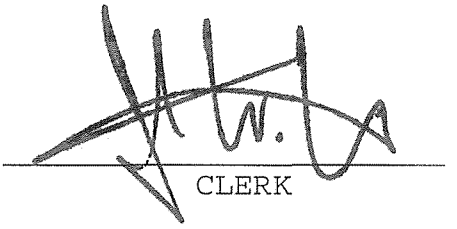
All of the injuries set forth in plaintiffs' bill of particulars are related to the vaccines or arose allegedly as a result of the failure to properly treat conditions created by the vaccinations. The alleged failure to properly diagnose and treat conditions allegedly caused by vaccinations is clearly "vaccine-related" *(see Aull v Secretary of Health & Human Servs.*, 462 F3d 1338, 1343 [Fed Cir 2006]). Given the mandate of the statute, dismissal was appropriate.

Plaintiffs contend that defendants should be estopped from raising NCVIA as a defense because they were derelict in their duty to inform plaintiffs of the Program, as required by 42 USC § 300aa-26(d). However, estoppel cannot operate to create a right where none exists (*Matter of Owens v McGuire*, 121 AD2d 292, 295 [1986]), nor can it relieve one from the mandatory operation of a statute (*Matter of Hauben v Goldin*, 74 AD2d 804, 805 [1980]). Since the infant's alleged injury was vaccine-related, plaintiffs' claim of lack of informed consent had to be raised first by petition to the United States Court of Federal Claims (§ 300aa-12[a]).

Leave to amend was properly denied because repleading would be futile (*see Rappaport v VV Publ. Corp.*, 223 AD2d 515, 516 [1996]).

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

ENTERED: OCTOBER 30, 2008



CLERK

Tom, J.P., Nardelli, Sweeny, McGuire, DeGrasse, JJ.

4468 The People of the State of New York, Ind. 10246/90
Respondent,

-against-

Paul Stanley,
Defendant-Appellant.

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

Order, Supreme Court, New York County (John Cataldo, J. at resentencing), entered on or about June 19, 2006, unanimously affirmed.

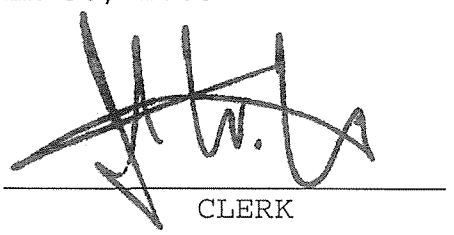
Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

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

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: OCTOBER 30, 2008



CLERK

Tom, J.P., Nardelli, Sweeny, McGuire, DeGrasse, JJ.

4470 Aaron Mittman, et al., Index 24188/06
Plaintiffs-Respondents,

-against-

Netherland Gardens Corp.,
Defendant-Appellant.

Pennisi, Daniels & Norelli, L.L.P., Rego Park (Sherrie A. Taylor of counsel), for appellant.

Gallet Dreyer & Berkey, LLP, New York (Morrell I. Berkowitz of counsel), for respondents.

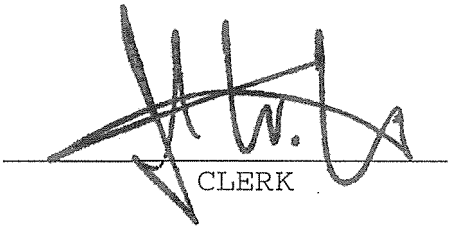
Order, Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered October 12, 2007, which denied defendant's motion for summary judgment dismissing the complaint, and granted plaintiffs' cross motion for summary judgment declaring them to be holders of unsold shares in defendant cooperative corporation entitled to sell without consent, and directed an inquest on damages, unanimously affirmed, without costs.

"[W]hether plaintiffs are holders of unsold shares should be determined solely by applying ordinary contract principles to interpret the terms of the documents defining their contractual relationship with the cooperative corporation" (*Kralik v 239 E. 79th St. Owners Corp.*, 5 NY3d 54, 57 [2005]). Under this standard, the motion court properly determined that the character of the unsold shares had not changed in that the original buyer

from the sponsor was a holder of unsold shares within the meaning of the offering plan, and the shares never lost their character as unsold because the apartment was never occupied by a purchaser for a bona fide occupancy (*see LJ Kings, LLC v Woodstock Owners Corp.*, 46 AD3d 321, 322 [2007]). Regarding defendant's arguments that the original buyer and plaintiffs never amended the offering plan or were designated as holders of unsold shares by the sponsor who never guaranteed the payment of maintenance charges and assessments due from them with respect to the unit, there is nothing in the offering plan indicating that noncompliance with such provisions divests the holders of unsold shares of that status (*see Kralik v 239 E. 79th St. Owners Corp.*, 54 AD3d 267 [2008]).

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

ENTERED: OCTOBER 30, 2008



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 30, 2008.

Present - Hon. Peter Tom, Justice Presiding
Eugene Nardelli
John W. Sweeny, Jr.
James M. McGuire
Leland G. DeGrasse, Justices.

The People of the State of New York, Ind. 31883C/05
Respondent,

-against- 4471

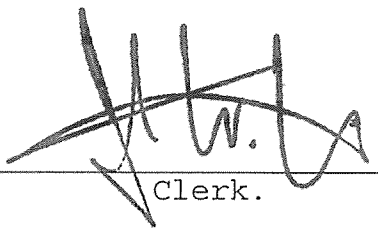
Jose Catala,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Robert G. Seewald, J.), rendered on or about December 4, 2006,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTER:



Clerk.

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

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
James M. Catterson
James M. McGuire
Rolando T. Acosta
Leland G. DeGrasse, JJ.

4282
Index 100414/08

x

In re Albany Manor Inc.,
Petitioner,

-against-

New York State Liquor Authority,
Respondent.

x

In this article 78 proceeding (transferred to this Court by order of the Supreme Court, New York County [Edward H. Lehner, J.], entered on or about February 29, 2008), petitioner challenges the determination of respondent New York State Liquor Authority, dated January 9, 2008, which, upon a finding that petitioner violated Alcoholic Beverage Control Law § 106(6), revoked their liquor license and directed forfeiture of its bond.

Mehler & Buscemi, New York (Martin P. Mehler of counsel), for petitioner.

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

CATTERSON, J.

The question posed by this appeal is whether there is substantial evidence to support the finding that the petitioner, owner of a tavern located in Brooklyn, "suffered or permitted" the use of marijuana on its premises in violation of subdivision 6 of section 106 of the Alcoholic Beverage Control Law.

Following a hearing, the Administrative Law Judge found that a police officer observed a patron of the petitioner's tavern smoking a marijuana cigarette. The ALJ sustained the charge of violating subdivision 6 of section 106 of the Alcoholic Beverage Control Law, revoked the tavern's liquor license and imposed a forfeiture of a $1,000 bond.

The police officer testified that she, along with eight other uniformed officers, her sergeant and members of the fire department, conducted a business inspection of the subject premises at 2:40 A.M. on July 2, 2006. Upon entering the tavern, she noticed an individual smoking marijuana approximately 8 to 10 feet away from her.

The officer stated that, although she canvassed the tavern, she did not see any other patrons smoking. The tavern was also inspected for various required signs, including "no smoking" signs, which were posted. The officer testified that it was dark and hard to see within the tavern and she used a flashlight not

as a means to single out the patron, but to safely navigate the club. Notably, none of the other officers testified that they witnessed anyone smoking.

The petitioner testified that the establishment employed eight security guards, all of whom were working that night. Four security guards were posted outside the entrance of the club to search and confiscate cigarettes and lighters from incoming patrons. Two guards stood at the door and two others walked around to ensure that no one smoked. Petitioner described the ventilation system within the club and stated that there was "no way that the place would smell full of marijuana." He stated that he did not personally see anyone smoking when the police performed their inspection.

The petitioner commenced this article 78 proceeding against the Authority, seeking an annulment of its determination on the grounds, principally, that (1) the record does not contain substantial evidence that it "suffer[ed] or permitt[ed] [the] premises to become disorderly" (Alcoholic Beverage Control Law § 106[6]), and (2) the penalty imposed was arbitrary and capricious. Specifically, the petitioner argues that it cannot be said to have "suffered or permitted" its premises to become disorderly by the commission of a single, isolated and surreptitious illegal act by a patron under circumstances where

the licensee could not with responsible diligence acquire knowledge of the act. We agree.

For the reasons set forth below we find that the evidence - a police officer's observation of one tavern patron smoking a marijuana cigarette on a single occasion - cannot possibly constitute substantial evidence that the petitioner "suffered or permitted its premises to become disorderly" within the meaning of the Alcoholic Beverage Control Law.

"Judicial review of the determination made by an administrative agency ... is limited to a consideration of whether that resolution was supported by substantial evidence upon the whole record." See 300 Gramatan Ave. Assoc. v. State Div. of Human Rights, 45 N.Y.2d 176, 181, 408 N.Y.S.2d 54, 57, 379 N.E.2d 1183, 1186 (1978). "Substantial evidence, which has been characterized as a minimal standard or as comprising a low threshold must consist of such relevant proof, within the whole record, as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." Matter of Café La China Corp. v. New York State Liq. Auth., 43 A.D.3d 280, 280, 841 N.Y.S.2d 30, 31 (1st Dept. 2007) (internal quotation marks and citations omitted). The test "relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact." Matter of

Pell v. Board of Educ. of Union Free School Dist. No.1 of Towns of Scarsdale and Mamaroneck, Westchester County, 34 N.Y.2d 222, 231, 356 N.Y.S.2d 833, 839, 313 N.E.2d 321, 325 (1974) (internal quotation marks and citation omitted).

It is beyond dispute that the credibility determinations of an administrative law judge are entitled to great weight. See Matter of Café La China Corp., 43 A.D.3d at 281, 841 N.Y.S. at 32; Matter of We Rest. v. New York State Liq. Auth., 175 A.D.2d 165, 572 N.Y.S.2d 55 (2nd Dept. 1991). Indeed, for purposes of this appeal we accept as *true* all of respondent's allegations concerning the officer's observations of conditions on the premises on the early morning of July 2, 2006. However, it is also uncontroverted that the petitioner had a staff of eight security guards present on the night in question; that patrons were patted down prior to entry and cigarettes and lighters were removed; that the security staff patrolled the inside of the premises to stop any smoking and would call "311" if patrons refused to comply; that there were numerous "no smoking" signs throughout the premises; that there were no ashtrays on the premises; that the police officer had no conversations with the management that night about any smoking on the premises; and, that police had received "311" calls about the premises.

In our view, there is simply no evidence of record, let

alone substantial evidence, that petitioner "suffered or permitted" marijuana to be smoked on the premises. To infer such permission or sufferance from a single customer observed to be smoking on a single occasion runs counter to considerable precedent. As the Court of Appeals painstakingly explained more than 50 years ago, addressing precisely this issue: "Sufferance ... implies knowledge or the opportunity through reasonable diligence to acquire knowledge. This presupposes in most cases a fair measure at least of continuity and permanence." Matter of Migliaccio v. O'Connell, 307 N.Y. 566, 568, 122 N.E.2d 914, 915 (1954) quoting People ex rel. Price v. Sheffield Farms-Slawson-Decker Co., 225 N.Y. 25, 30, 121 N.E. 474 (1918) (Cardozo, J.).

In affirming an order of the Appellate Division (283 App. Div. 1112 (1954)) annulling a determination of the State Liquor Authority which had revoked a license for violation of section 106(6), the law in question here, the Migliaccio Court determined that a single act of solicitation was not enough to justify a license revocation under the statute. The Court concluded:

> "We are not unmindful of the Authority's efforts to curb disorderly conduct in licensed premises. Where, however, premises are claimed to be disorderly within the purview of the statute, and the Authority asserts constructive knowledge on the part of the licensee, substantial evidence of disorderliness-- beyond a brief single occurrence of which the licensee may or may not have been aware-- should be presented so as to establish that the licensee should have known that a disorderly condition prevailed." Matter of

Migliaccio, 307 N.Y. at 569, 122 N.E.2d at 915-916. See Matter of Missouri Realty Corp. v. New York State Liq. Auth., 22 N.Y.2d 233, 237, 292 N.Y.S.2d 423, 425, 239 N.E.2d 356, 357 (1968) (quoting Migliaccio with approval).

Tested by the standard set forth in Migliaccio, the proof in the instant case utterly fails to establish the violation charged. Like in Migliaccio, the act in question was brief and isolated, albeit, illegal. As a practical matter, there were few, if any, other safeguards that the petitioner could have taken to prevent the act from occurring. Since there is no evidence of record that the petitioner had knowledge of the act and there was no continuity nor permanence of any condition, we conclude that the petitioner did not permit or suffer the premises to become disorderly within the meaning of subdivision 6 of section 106 of the Alcoholic Beverage Control Law. See also Matter of Peanutbutter Jam v. New York State Liq. Auth., 58 A.D.2d 703, 396 N.Y.S.2d 104 (3d Dept. 1977) (finding that there was insufficient evidence of disorderly conduct to revoke license where the incident out of which the charge grew [an argument between patrons] occurred without warning and was an isolated and spontaneous event which no amount of supervision was likely to prevent); Matter of Ray's Tenderloin, Inc. v. New York State Liq. Auth., 20 A.D.2d 695, 246 N.Y.S.2d 769 (1st Dept. 1964) (finding that a licensee has not suffered or permitted his premises to

become disorderly where there was no evidence that the licensee aided or condoned a single act of solicitation by a prostitute); Matter of Leake v. Sarafan, 35 N.Y.2d 83, 358 N.Y.S.2d 749, 315 N.E.2d 796 (1974) (where the licensee did not have knowledge or the opportunity through reasonable diligence to acquire knowledge of the alleged acts [gambling on the premises]).

Even if an employee was the person smoking marijuana, precedent dictates that a single act is nonetheless simply insufficient. In Matter of Playboy Club of N.Y. v. State Liq. Auth. of State of N.Y. (23 N.Y.2d 544, 297 N.Y.S.2d 926, 245 N.E.2d 697 [1969]), the Court of Appeals annulled the determination to suspend a license after a bouncer had hit a patron in an area of the premises not open to the public. The Court found no violation even if it "were to assume that there was support for a finding that the force used was excessive, there was no basis in law for holding the club responsible for such a single isolated act by its employee, an act which manifestly occurred on the spur of the moment." 23 N.Y.2d at 550, 297 N.Y.S.2d at 930.

Finally, respondent's failure to show that someone involved in the smoking of marijuana was in a managerial position

precludes a violation of Alcoholic Beverage Control Law § 106(6). In three cases directly involving narcotics and or controlled substances, the Courts have found that without a finding of managerial involvement, there was no violation. See Matter of Richjen Rest. v. State Liq. Auth., 51 N.Y.2d 847, 433 N.Y.S.2d 755, 413 N.E.2d 1170 (1980)(three separate sales, no managerial involvement); Matter of De Palo v. New York State Liq. Auth., 82 A.D.2d 831, 439 N.Y.S.2d 674 (2nd Dept. 1981) aff'd, 54 N.Y.2d 950, 445 N.Y.S.2d 154, 429 N.E.2d 833 (1981)(brief incident, no managerial involvement); Matter of Ozzie's Bar & Grill v. New York State Liq. Auth., 66 A.D.2d 892, 411 N.Y.S.2d 684 (2nd Dept. 1978) (18 separate occasions, no managerial involvement).

Accordingly, the petition brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Edward H. Lehner, J.], entered on or about February 29, 2008), challenging the determination of respondent New York State Liquor Authority, dated January 9, 2008, which, upon a finding that petitioner violated Alcoholic Beverage Control Law § 106(6), revoked petitioner's liquor license and directed forfeiture of

its $1,000 bond, should be granted and said determination anulled, without costs.

All concur.

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

ENTERED: OCTOBER 30, 2008

CLERK