SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 8, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Andrias, Buckley, Sweeny, Renwick, JJ.

4261 Denise Shumway, Index 107625/04
Plaintiff-Respondent,

-against-

Harold Bungeroth, et al.,
Defendants-Appellants.

Marjorie E. Bornes, New York, for appellants.

Law Offices of Michael M. Goldberg, P.C., New York (Andrew Romer of counsel), for respondent.

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered February 26, 2008, which denied defendants' motion for summary judgment dismissing the complaint, affirmed, without costs.

Defendants failed to meet their initial burden of establishing that plaintiff had not sustained serious injury within the meaning of Insurance Law § 5102(d). Defendants' medical expert, who examined plaintiff four years after her April 2003 accident, reviewed only the police accident report and the bill of particulars, and did not address any of plaintiff's medical records, including reports of examinations in May and July 2003 revealing diminished range of motion, in specified

degrees, in the cervical, thoracic, lumbar, and sacral hip areas, as well as a June 2003 MRI report indicating disc bulges and herniation.

We agree with the dissent insofar as it states that the failure of a defendant's medical expert to discuss diagnostic tests indicating bulging or herniated discs will not, by itself, require denial of a defense summary judgment motion (*see Onishi v N & B Taxi, Inc.*, 51 AD3d 594 [2008]). However, the decision in *Onishi*, relied on by the dissent, notes that where, as here, a defendant's expert fails to address "not only MRI reports indicating herniated discs but other evidence of serious injury as well," the defense has not met its initial burden on summary judgment (*id.* at 596).

Even if defendants were deemed to have made a prima facie showing, a triable issue of fact was raised by plaintiff's evidence, including her expert's affirmed report of an examination showing a continued quantified loss of range of motion after defendant's expert's examination.

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

ANDRIAS, J. (dissenting)

While defendants' neuromuscular rehabilitative expert, who examined plaintiff four years after the April 2003 automobile accident and found no physical limitations, failed to address findings in plaintiff's medical records that included a June 17, 2003 MRI report indicating that plaintiff had a disc herniation at L1-2 and a disc bulge at L5-S1, the mere failure to address these findings does not mean that defendants failed to meet their initial burden of establishing a prima facie case that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (*Onishi v N & B Taxi, Inc.*, 51 AD3d 594 [2008]; *see also Style v Joseph*, 32 AD3d 212, 1214 [2006]; *Santana v Khan*, 48 AD3d 318 [2008]). In opposition, plaintiff failed to raise a triable issue of fact regarding whether she sustained a serious injury.

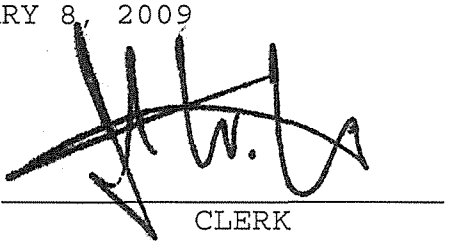
The August 2007 report of plaintiff's chiropractor, aside from not being "contemporaneous," noted minor limitations, but failed to compare any findings he made as to ranges of motion in May and July 2003 with the "normal function, purpose and use of the affected body organ, member, function or system" (*Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 350 [2002]). The only contemporaneous evidence, an unsworn May 27, 2003 report of a neurological consultation, established that plaintiff had normal ranges of motion and normal Straight Leg Raise. Moreover,

plaintiff testified at her deposition that although she continued to have persistent neck and lower back pain, after the accident she stayed in bed for only two days and did not miss any time from work, and that her treatment consisted of visits to the chiropractor for a year. Thereafter, she chose to stop treatment and started taking yoga classes.

Accordingly, I would reverse and grant defendants summary judgment dismissing the complaint.

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

ENTERED: JANUARY 8, 2009



CLERK

Mazzarelli, J.P., Andrias, Nardelli, Buckley, Freedman, JJ.

4391 In re Police Officer Kathleen Clifford, etc., Petitioner,

-against-

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

Index 103179/07

Worth, Longworth & London, LLP, New York (Howard B. Sterinbach of counsel), for petitioner.

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

Determination of respondent Police Commissioner, dated December 20, 2006, finding petitioner guilty of the departmental infraction of failure to comply with a superior officer's order, and imposing a forfeiture of 10 vacation days, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Walter B. Tolub, J.], entered August 17, 2007), dismissed, without costs.

It is undisputed that on December 11, 2005: petitioner police officer missed roll call and arrived at her assigned stationhouse 25 minutes late for duty; her supervising officer, Sergeant James Logan, ordered her to proceed directly to the locker room and change into her uniform; rather than go directly upstairs to the locker room, petitioner walked down a hallway a

few feet past the staircase and went to the muster room to pick up a "cookie sheet," which lists officers' assignments prior to a tour of duty, but not changed assignments; Sergeant Logan followed petitioner into the muster room and repeated his directive that she go to the locker room and change, at which point she complied.

Because petitioner was 25 minutes late, Sergeant Logan had reassigned her to a new duty, not reflected on the "cookie sheet." He and petitioner disputed whether he told her to report back to him from the locker room for her assignment; petitioner testified that she detoured to the muster room in order to pick up her "cookie sheet" and ascertain her assignment, so that she could equip herself appropriately.

The hearing officer sustained the charge of disobeying an order of a superior officer, "based on [petitioner's] admission that after receiving Logan's order, she did not proceed directly upstairs to get dressed, but instead went to the back muster room." The hearing officer noted in mitigation that "it is not likely that [petitioner] would have intentionally disobeyed his command," but rather, "it is more likely that she was trying to better prepare for her tour when she momentarily detoured to the back muster room before going upstairs to the locker room," and thus, "her actions were in good faith, work-related, and *de minimis* in nature." In light of those mitigating circumstances,

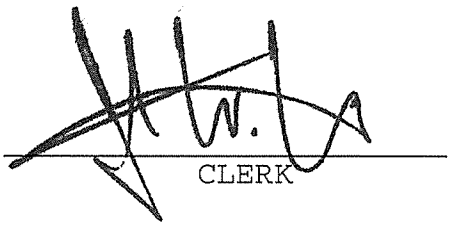
the hearing officer recommended a forfeiture of 10 vacation days.

Substantial evidence supports the hearing officer's determination that, essentially, petitioner did not disregard a superior officer's order out of discourtesy, but out of a belief that she knew better than he how to carry out her duties. The Police Department is a paramilitary organization (*see Matter of Caruso v Ward*, 72 NY2d 432, 439 [1988]), and as such, depends for its effectiveness on prompt obedience to lawful orders under a hierarchical command structure. Indeed, the commands often have life or death consequences for officers and civilians. The fact that the command at issue did not rise to that level of importance was taken into consideration by the Commissioner in imposing a relatively minor penalty, which is not so disproportionate to the offense as to be shocking to one's sense of fairness, particularly considering the Commissioner's great leeway in matters of police discipline (*see Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001]; *Matter of Padilla v Kelly*, 41 AD3d

271 [2007] [penalty of probationary dismissal and forfeiture of 32 days of pay for failure to comply with lawful order of superior officer not shocking to the conscience]).

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

ENTERED: JANUARY 8, 2009



CLERK

Mazzarelli, J.P., Friedman, Gonzalez, Buckley, Sweeny, JJ.

4740 Lucia C. Elias, et al., Index 24760/06
Plaintiffs-Respondents,

-against-

Moses B. Mahlah,
Defendant-Appellant.

Buratti, Kaplan, McCarthy & McCarthy, Yonkers (Jeffrey A. Domoto of counsel), for appellant.

Michael Fuller Sirignano, Cross River, for respondents.

Order, Supreme Court, Bronx County (Nelson S. Roman, J.), entered March 20, 2008, which denied defendant's motion for summary judgment dismissing the complaint for failure to meet the "serious injury" threshold of Insurance Law § 5102(d), unanimously modified, on the law, the motion granted with respect to plaintiff Lucia Elias's direct claim, and granted with respect to plaintiff Abel Elias's claim only to the extent it alleged injuries preventing him from performing substantially all of the material acts that constituted his usual and customary activities for not less than 90 days during the first 180 days following the accident, and otherwise affirmed, without costs.

The motion court correctly determined that the evidence submitted by defendant failed to meet his initial burden of establishing prima facie that Abel Elias did not sustain a serious injury (*Korpalski v Lau*, 17 AD3d 536 [2005]). Defendant's own examining orthopedist reported finding evidence

of Abel Elias's fracture, which he causally related to the accident. A fracture, by definition, constitutes a "serious physical injury" under the statute and hence, defendant's motion was properly denied.

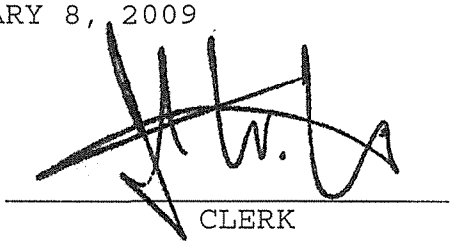
A different result is warranted, however, with respect to the claims under the 90/180 category of serious physical injury. In order to establish prima facie entitlement to summary judgment under this category of the statute, defendant must provide medical evidence of the absence of injury precluding 90 days of normal activity during the first 180 days following the accident (*see Sayers v Hot*, 23 AD3d 453 [2005]). However, we have previously held that a defendant can establish prima facie entitlement to summary judgment on this category without medical evidence by citing other evidence, such as the plaintiff's own deposition testimony or records demonstrating that he or she was not prevented from performing all of the substantial activities constituting customary daily activities for the prescribed period (*see Copeland v Kasalica*, 6 AD3d 253 [2004]). While defendant did not submit plaintiffs' deposition testimony in his original moving papers, relying instead on their bills of particulars, plaintiffs did submit their depositions in their opposition papers and defendant made reference to that testimony in his reply papers. Therefore, the issue was sufficiently before the court.

Here, Lucia Elias claimed injuries consisting of contusions to her sternum, right rib cage and right hip, and that she was confined to bed for one week and to her home for two weeks after the accident. Abel Elias testified that he was confined to home for a few days. There is no competent medical evidence before the court demonstrating that either plaintiff was unable to perform substantially all of their normal activities for at least 90 of the first 180 days as a result of the accident (*Ponce v Magliulo*, 10 AD3d 644 [2004]).

Therefore, defendant's motion with respect to this aspect of the claims should have been granted. Since this was Lucia Elias's only ground for a serious injury claim, her entire claim with regard to loss of consortium, should have been dismissed. Abel Elias's claim is viable only with regard to his fracture.

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

ENTERED: JANUARY 8, 2009



CLERK

Andrias, J.P., Saxe, Sweeny, Catterson, Moskowitz, JJ.

4779 Heritage Realty Advisors, LLC, et al., Index 105483/07
Plaintiffs-Respondents,

-against-

Mohegan Hill Development, LLC, et al.,
Defendants-Appellants.

Meyer, Suozzi, English & Klein, P.C., Garden City (Jeffrey G. Stark of counsel), for appellants.

The Dweck Law Firm, LLP, New York (Jack S. Dweck and Corey Stark of counsel), for respondents.

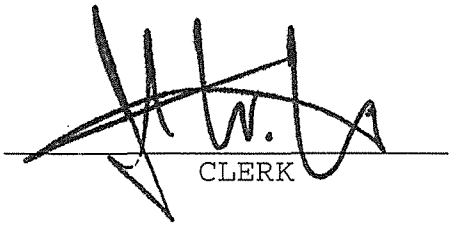
Order, Supreme Court, New York County (Rolando T. Acosta, J.), entered October 16, 2007, which denied defendants' motion pursuant to CPLR 3211(a)(5) to dismiss the complaint, unanimously reversed, on the law, with costs, the motion granted and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

The dismissal in a prior Westchester County action, pursuant to CPLR 3211(a)(1) and (7), of plaintiffs' breach of contract action as against defendant Mohegan Hill Development, LLC (MHD), bars the instant action for, inter alia, tortious interference with a contract and unjust enrichment, as to all defendants (*see generally O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). Not only are the two actions based on the same transactions, but the dismissal of the prior action, to the extent that it found that MHD was not in existence at the time the compensation

agreements at issue were entered into, was not merely because of technical pleading defects, but on the merits (*see Lampert v Ambassador Factors Corp.*, 266 AD2d 124 [1999]; *Feigen v Advance Capital Mgt. Corp.*, 146 AD2d 556, 558-559 [1989]). Dismissal of this action as against the remaining defendants is warranted since they are in privity with MHD (*see Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485 [1979]).

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

ENTERED: JANUARY 8, 2009



Andrias, J.P., Nardelli, Sweeny, DeGrasse, Freedman, JJ.

4836-
4836A The State of New York, ex rel. Barbara D., Petitioner-Appellant, Index 109255/08

-against-

Francis D., Respondent-Respondent.

- - - - - - - - -

Francis D., Plaintiff-Respondent, Index 305701/04 350827/99

-against-

Barbara D., Defendant-Appellant.

Bruce A. Young, New York, for appellant.

Francis D., respondent pro se.

Orders, Supreme Court, New York County (Laura Visitación-Lewis, J.), entered on or about July 15, 2008, which denied appellant former wife's motion for an order authorizing her unsupervised visitation with the parties' child, and dismissed her proceeding for a writ of habeas corpus, affirmed, without costs.

The continuation of supervised visits was directed by order of Supreme Court (Judith J. Gische, J.), entered December 3, 2004. According to that order, the supervised visitation would continue "for an indeterminate duration and until there has been a sufficient change in circumstances warranting a modification."

The court expressed concern that appellant was coaching the then-five-year-old child to make accusations of abuse against her father. Although at that time the supervisors did not report any actual coaching, Justice Gische noted that appellant's single-minded search to collect evidence to "get" the father was emotionally harmful to the child, and that her negative and hostile remarks confused and upset the child.

"One who seeks to modify an existing order of visitation is not automatically entitled to a hearing, but must make some evidentiary showing sufficient to warrant it" (*Matter of Timson v Timson*, 5 AD3d 691, 692 [2004]). With respect to the instant application, appellant has failed to make a prima facie showing of a sufficient effort on her part to break the pattern of hostility and destructive behavior that led the court to require supervised visitation in the first place. In fact, in an August 2007 letter to the court, appellant's therapist, Michael Leiman, CSW, stated: "She holds much anger - much stemming from her relationship with her ex husband & from present circumstances with the visits which she regards as unfair. This is reflected, probably, in hyper vigilance about [the child's] well being & over concerns of neglect by the father." This excerpt from a document submitted by appellant herself demonstrates that she has failed to gain sufficient insight into her underlying behavior.

She expresses remorse only for some vituperative and profane tirades that she directed at her former husband, within earshot of the child. In weighing this claim of regret, we note that the tirades are undeniable because they were tape-recorded by the father. Accordingly, the court correctly determined appellant had failed to demonstrate a change in circumstances that would warrant a change in the conditions of visitation.

Appellant's additional argument that she should not have to continue to bear the cost of visitation is unfounded. She never objected to entry of the access monitor order, which sets forth the relevant fees. Moreover, in a previous order, the court noted, contrary to appellant's current contention, that at an appearance in October 2007, the access supervisor informed the court he had repeatedly offered to arrange for appellant to receive free supervision services through the Society for the Prevention of Cruelty to Children. The court also noted that appellant did not at that time dispute the supervisor's representation and indeed agreed that he should make the necessary arrangements.

In light of that portion of the order directing the resumption of supervised visitation at the earliest date possible, the court correctly dismissed the proceeding for a writ of habeas corpus as moot.

We have considered appellant's remaining arguments and find them without merit.

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

SWEENY, J. (dissenting in part)

I must part company with the majority on two issues.

I agree that a party seeking modification of an existing order of visitation is not automatically entitled to a hearing, but must make a sufficient evidentiary showing of changed circumstances to warrant one (*Matter of Timson v Timson*, 5 AD3d 691 [2004]). In this case, appellant has made such a showing.

The evidence fully warranted the imposition of supervised visitation in the past. Furthermore, appellant's repeated applications to terminate supervised visitation feed into that conduct and would try the patience of any trial court. However, on the record before us, appellant, on this application, has sufficiently met her burden of showing changed circumstances to at least warrant a hearing.

Appellant submitted a certificate, dated July 27, 2007 that she had completed a parenting course. While the majority cites her therapist's report of August, 2007 to the court that she still "holds much anger" against her ex-husband, it does not appear anywhere that that anger is in any way directed at the child. Indeed, later reports from the therapist, whom appellant has been seeing on a regular basis, state in no uncertain terms that supervised visitation was doing more harm than good to the mother-child relationship and should be ended immediately. Also reflected in those reports are the concerns about the role of the

supervisor in the visitation process.

It goes without saying that the main factor in determining appropriate visitation between parent and child is the best interests of the child. We have previously noted - and this is in no way a criticism of the lower court - that "The court's observations of [a party's] demeanor and conduct in court should not be the focus when considering the visitation arrangement. The focus must be solely on the child's best interest, which is normally best protected by allowing the development of the fullest possible healthy relationship with both parents" (*Nimkoff v* Nimkoff, 18 AD3d 344, 347 [2005]; *see also Weiss v Weiss*, 52 NY2d 170, 174-175 [1981]).

Significantly, the child is now 10 years old. It has been almost 5 years since the entry of the original order which is a significant period in this child's development. Appellant's therapist's comments of September 8, 2007 are noteworthy in this regard: "Supervised visits should end now. They do not make Barbara a better mother. They do not foster healthier & more consistent contact between mother & daughter. In fact they are doing the opposite. They do not serve Barbara as a parent & they do not serve the mother & child relationship."

In short, unlike her prior applications to end supervised visitation, appellant has now demonstrated that she has taken some affirmative steps to alter her prior conduct. The parenting

course, which was not mandated by the court, along with her regular therapy, indicates an awareness that her prior conduct was inappropriate and detrimental. Her issues with the visitation supervisor, whether or not justified, are also apparently being addressed differently than she would have in the past.

I emphasize that the evidence submitted warrants nothing more than a hearing where the court can take testimony, tested by cross examination, and then be able to make an informed decision whether to grant, deny or modify appellant's application.

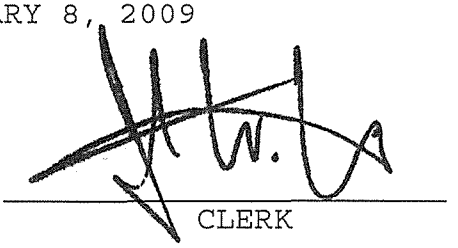
In that connection, I believe the court improperly rejected as "overbroad" appellant's draft subpoena to obtain access to the supervisor's records, which would be highly relevant to a determination whether supervision should be terminated. The subpoena was limited in time and scope to documents after January 2007, pertaining to supervision of appellant's visits with the child. One of the recurrent themes in her therapist's reports to the court has been appellant's complaints about the visitation supervisor. Whether or not these complaints are legitimate

remains to be seen, but certainly those records, limited in time and scope, would be highly relevant at a hearing.

On all remaining issues, I concur with the majority.

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

ENTERED: JANUARY 8, 2009



CLERK

Mazzarelli, J.P., Saxe, Friedman, Acosta, DeGrasse, JJ.

4990 The People of the State of New York, Ind. 2659/04
Respondent,

-against-

Troy Logan,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Nikki Woods of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Robert A. Sackett, J.), rendered July 6, 2005, convicting defendant, after a jury trial, of robbery in the third degree, and sentencing him, as a second felony offender, to a term of 3½ to 7 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning identification. The victim had an adequate opportunity to view the robber at a distance of three and one-half feet as he rifled through her wallet. She provided a detailed and accurate description, and she was certain that he was the robber.

The court properly denied defendant's suppression motion. Photographs of the lineup establish that defendant and the other participants were very similar in appearance, and that defendant

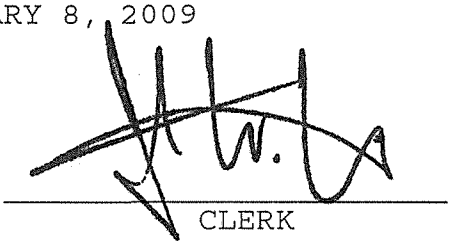
was not singled out in any manner (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). The victim had described defendant as bald, and two of the fillers, like defendant, were completely bald, while the other two had very little hair. We reject defendant's argument that this factor "eliminated" two fillers as possible choices for the victim. On the contrary, the photographs reveal little difference among the participants. Moreover, in common parlance men who are actually "balding" or partially bald are often referred to as "bald." The photographs also show that the height differences among the lineup participants, who were seated, were barely noticeable.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters outside the record concerning counsel's reasons for not calling an identification expert or moving to reopen the suppression hearing based on trial testimony (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). We find unpersuasive defendant's argument that there could not have been any strategic explanations for these omissions. On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that either of the complained-of choices by counsel

was unreasonable, or that they caused him any prejudice or deprived him of a fair trial. We note that at the time of defendant's trial, the Court of Appeals had not yet decided *People v LeGrand* (8 NY3d 449 [2007]), which sets forth the standard for determining the admissibility of such expert testimony, and it cannot be assumed that the trial court would have permitted the expert to testify. In any event, defendant has not shown a reasonable probability that expert testimony would have affected the verdict. Nor was counsel ineffective for failing to move to reopen the suppression hearing based on trial testimony concerning procedures employed by a detective in setting up the lineup. This matter was peripheral, and it cast no doubt on the fairness of the lineup. Defendant has not shown any likelihood that the trial court would have reopened the hearing (*see* CPL 710.40[4]; *see People v Clark*, 88 NY2d 552, 555 [1996]), or that a reopened hearing would have led to suppression of the lineup.

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

ENTERED: JANUARY 8, 2009



CLERK

Mazzarelli, J.P., Saxe, Friedman, Acosta, DeGrasse, JJ.

4991 Marie Castro, Index 405639/07
Petitioner,

-against-

Department of Social Services, etc., et al.,
Respondents.

Marie Castro, petitioner pro se.

Michael A. Cardozo, Corporation Counsel, New York (Susan B. Eisner of counsel), for Department of Social Services, respondent.

Andrew M. Cuomo, Attorney General, New York (Marion R. Buchbinder of counsel), for New York State Office of Temporary and Disability Assistance, respondent.

Decision by the Office of Temporary and Disability Assistance, dated June 12, 2007, which, after a fair hearing, upheld the determination of respondent New York City Department of Social Services (DSS) to discontinue pubic assistance benefits for petitioner's failure to appear at a mandatory appointment for evaluation of work activity, unanimously confirmed, the petition denied, and this Article 78 proceeding (transferred to this Court by order of Supreme Court, New York County [Jane S. Solomon, J.], entered October 1, 2007), dismissed, without costs.

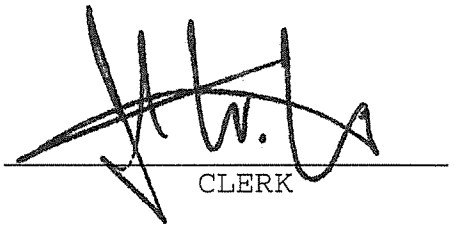
There was substantial evidence to support the determination that petitioner's failure to comply with the employment requirement for public assistance by missing a mandatory work activity evaluation appointment was willful and without good

cause (*see Matter of Tessler v Hammons*, 251 AD2d 63 [1998]). The record reveals that petitioner received notice of her appointment (*see Matter of Bonilla v New York State Dept. of Social Servs.*, 219 AD2d 526 [1995], *lv denied* 87 NY2d 807 [1996]), but failed to appear due to a conflict with an internship she had started two weeks earlier. That job, which demanded only 12 hours of her work per week, had been secured on her own, without approval by DSS. She never notified DSS of any conflict with her appointment, even though the notice of her meeting offered her that opportunity.

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

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

ENTERED: JANUARY 8, 2009



CLERK

Mazzarelli, J.P., Saxe, Friedman, Acosta, DeGrasse, JJ.

4992-
4993 In re Virginia S.,
Petitioner-Appellant,

-against-

Thomas S.,
Respondent-Respondent.

Randall S. Carmel, Syosset, for appellant.

Orders, Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about August 10, 2006 and March 3, 2008, which, to the extent appealed from, respectively reduced respondent's child-support arrears payments to $100 per week, and reconfirmed that downward modification while finding no willful violation of the 2006 order, unanimously reversed, on the law, without costs, the payment schedule reinstated to $1,500 per month, the violation deemed to be willful, and the matter remanded to determine an appropriate sanction for the violation.

The party seeking modification of a support award bears the burden of proving a substantial change in circumstances (*see Matter of Derrick v Derrick*, 162 AD2d 348 [1990], *lv denied* 76 NY2d 708 [1990]). In a prior order in 2005 (22 AD3d 415), we rejected an unattested financial disclosure affidavit and a single pay stub as warranting such a reduction, while noting evidence of respondent's considerable financial resources and earning capacity. At a new hearing on remand, respondent again

failed to provide documentation of his income and assets sufficient to justify a modification of his scheduled payments. Although his testimony supported his claim of a substantial change of circumstances, he failed to provide any documentation to substantiate it. His evidence consisted of an unsigned and unattested financial affidavit, and unsigned tax returns from 2004 and 2005. He produced no other tax returns, nor any verification that he was receiving public assistance or any evidence of good faith efforts to obtain employment commensurate with his experience and qualifications (*see Beard v Beard*, 300 AD2d 268 [2002]).

In a related enforcement proceeding in 2007, petitioner alleged, and it was undisputed, that respondent had failed to make any support payments since 2005. The only question that remained was whether this violation was willful.

Failure to pay support as ordered constitutes prima facie evidence of a willful violation (Family Ct Act § 454[3][a]). The burden then shifts to the supporting party, who must offer some competent, credible evidence of his inability to make the required payments (*Matter of Powers v Powers*, 86 NY2d 63, 69 [1995]). Only when such evidence is presented does the burden shift back to the recipient to contradict that proof.

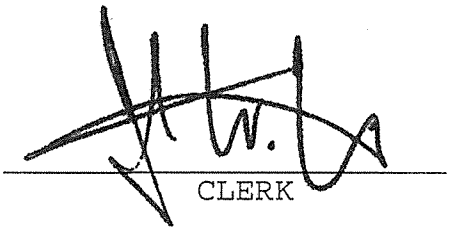
At the violation hearing, respondent offered only his own testimony regarding his income and assets, his health status, and

his inability to find work. However, he again failed to substantiate his claims with documentation, such as signed tax returns, a completed and attested financial affidavit, or the testimony of his doctors regarding his alleged disabilities. Nor did he provide any documentation about his efforts to obtain employment, such as a resume, job applications, or a job search diary. Notably, respondent even admitted that although he had applied for social security disability, his application was rejected because he was not deemed to be disabled. He has a potentially high earning capacity as a stockbroker and holder of a commercial driver's license.

Respondent has failed to overcome the prima facie evidence that his violation was willful. That being the case, petitioner was not required to come forward with evidence to contradict respondent's assertions. The appropriate sanction for this willful violation should be determined on remand.

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

ENTERED: JANUARY 8, 2009



CLERK

Mazzarelli, J.P., Saxe, Friedman, Acosta, DeGrasse, JJ.

4996 The People of the State of New York, Ind. 6077/06
Respondent,

-against-

Melvin Kelley,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered August 3, 2007, convicting defendant, after a jury trial, of criminal sexual act in the first degree, sexual abuse in the first degree (two counts), aggravated sexual abuse in the second degree (two counts), and attempted assault in the second degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 25 years to life, unanimously affirmed.

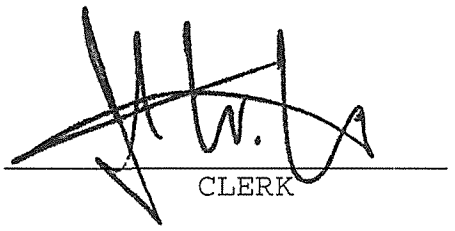
The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility and identification. Defendant's claims that the victim fabricated the incident or confused defendant with someone else are unpersuasive. We note that there was eyewitness testimony corroborating the fact that a sexual assault occurred,

and conduct by defendant evincing a consciousness of guilt.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 8, 2009



CLERK

Mazzarelli, J.P., Saxe, Friedman, Acosta, DeGrasse, JJ.

4997 Barbara Stewart, etc., Index 603709/04
Plaintiff-Respondent,

-against-

Guy E.C. Maitland, et al.,
Defendants-Appellants,

Dunoon, LLC, et al.,
Defendants.

Duane Morris LLP, New York (Hyman L. Schaffer of counsel), for appellants.

Satterlee, Stephens, Burke & Burke, LLP, New York (Mario Aieta of counsel), for respondent.

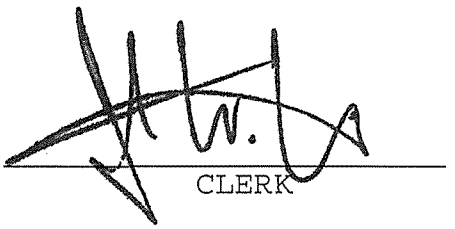
Judgment, Supreme Court, New York County (Karla Moskowitz, J.), entered November 7, 2007, awarding plaintiff $2,866,402.75 against defendants Maitland, Guida, International Registries and Oban, unanimously affirmed, with costs.

Since plaintiff's counsel's opening statement at trial was not part of the evidence, it did not "open the door" to conversations between the decedent and the judgment debtors herein, or otherwise constitute a waiver of the provisions of CPLR 4519, concerning the subject memorandum of agreement (*see*

Matter of Wood, 52 NY2d 139 [1981]; *cf. Matter of Beradini*, 238 App Div 433, 435 [1933], *affd* 263 NY 627 [1934]).

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

ENTERED: JANUARY 8, 2009



CLERK

Mazzarelli, J.P., Saxe, Friedman, Acosta, DeGrasse, JJ.

4998-
4999 Katsam Holdings LLC, Index 117297/06
Plaintiff-Respondent,

-against-

419 West 55th Street Corporation,
Defendant-Appellant,

419 West 55th Street LLC,
Defendant.

Rosen & Livingston, New York (Alan M. Goldberg of counsel), for appellant.

Karlsson & Ng, P.C., New York (Kent Karlsson of counsel), for respondent.

Order, Supreme Court, New York County (Martin Shulman, J.), entered July 5, 2007, which, inter alia, denied defendant-appellant cooperative's cross motion to dismiss the complaint, and order and judgment (one paper), same court and Justice, entered July 16, 2008, which, upon the parties' respective motions for summary judgment, inter alia, declared plaintiff to be a holder of unsold shares (HUS) entitled to make alterations to and use the subject unit as a veterinary clinic without the coop's consent, enjoined the coop to sign the documents necessary to obtain a certificate of occupancy for the subject unit, otherwise enjoined the coop not to interfere with plaintiff's rights as a HUS, and reformed the proprietary lease to the unit insofar as it prohibits commercial use of the unit or requires

the coop's consent to commercial use, unanimously affirmed, with one bill of costs.

Defendant-respondent sponsor's offering plan for the conversion designated the lower level of the building for commercial use, and the Plan's bylaws permitted any legal use of the subject basement unit with the exception of defined "adult" uses. The Plan also provided that the sponsor could designate a HUS, and that a HUS had the right to make alterations to a unit without the coop's consent. Plaintiff's assignor entered into a contract with the sponsor to buy the basement unit for use as a veterinary clinic. The contract provided that residential use of the basement was not permitted, that the sale was subject to the coop's consent to alterations for use as a veterinary clinic, and that if such consent was not given within 60 days for any reason other than assignor's bad faith, the sponsor would designate plaintiff a HUS. Plaintiff was so designated at the closing, the coop having refused to consider plaintiff's proposed alterations prior to the closing, and the sponsor thereafter filed an amendment to the Plan confirming plaintiff's status as a HUS. The proprietary lease signed by plaintiff at the closing, however, prohibited occupancy or use of the unit for any purpose other than as a private dwelling or the making of alterations without the coop's prior written consent. Thereafter, the coop considered plaintiff's proposed alterations but made numerous

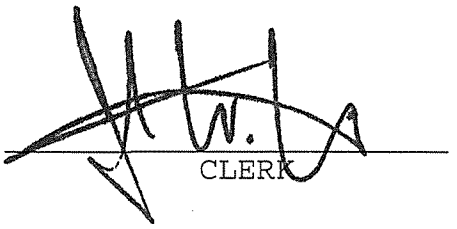
demands conditioning its consent, and refused to sign the application necessary to obtain a permanent certificate of occupancy.

In view of the Plan (*see Likokoas v 200 E. 36th St. Corp.*, 48 AD3d 245 [2008]), which is binding on the coop as a contract (*cf. 511 W. 232and Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153-154 [2002]), the court correctly found plaintiff to be a HUS entitled to use the unit as a veterinary clinic, and to make alterations for such use, without the coop's consent. The lease provisions to the contrary were clearly due to a mutual mistake -- using a residential rather than a commercial lease form -- and the lease was accordingly properly reformed so as to conform with the Plan (*see Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]); indeed, it appears that the subject unit is unsuitable for residential use (*see 1414 APF, LLC v Deer Stags, Inc.*, 39 AD3d 329, 331 [2007]). It does not avail the coop that the sponsor failed to guarantee plaintiff's obligations as required by the lease and Plan, since neither the lease nor Plan required that the guaranty be separate from the HUS designation. Under the Plan, a HUS designation carries with it the sponsor's financial

guarantee. Moreover, the Plan amendment designating plaintiff a HUS expressly noted the guarantee. We have reviewed the coop's other arguments and find them without merit.

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

ENTERED: JANUARY 8, 2009



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 January 8, 2009.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
David B. Saxe
David Friedman
Rolando T. Acosta
Leland G. DeGrasse, Justices.

The People of the State of New York, Ind. 4131/07
Respondent,

-against- 5002

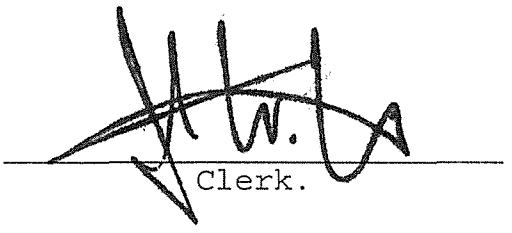
Angelo Ortiz,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (John Byrne, J.), rendered on or about December 13, 2007,

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

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

ENTER:



Clerk.

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

Mazzarelli, J.P., Saxe, Friedman, Acosta, DeGrasse, JJ.

5003 The People of the State of New York, Docket 11191C/05
Respondent,

-against-

Simone Thomas,
Defendant-Appellant.

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

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

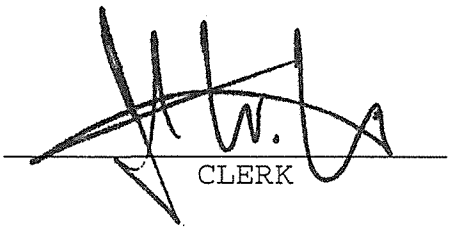
Judgment, Criminal Division of the Supreme Court, Bronx County (Margaret Clancy, J.), rendered January 20, 2006, convicting defendant, after a nonjury trial, of two counts of attempted aggravated harassment in the second degree, and sentencing her to a conditional discharge, unanimously affirmed.

With respect to the conviction of attempted aggravated harassment in the second degree under Penal Law § 240.30(1), the accusatory instrument was facially sufficient, and the verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant's telephone call to the victim contained a death threat that placed the victim in reasonable fear for her safety (*see People v Limages*, 19 Misc 3d 395, 400 [Crim Ct, Kings County 2005]; *People v Tiffany*, 186 Misc 2d 917, 920-921 [Crim Ct, NY County 2001]).

With respect to the conviction relating to Penal Law § 240.30(2), defendant's challenge to the sufficiency of the accusatory instrument is without merit.

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

ENTERED: JANUARY 8, 2009



Mazzarelli, J.P., Saxe, Friedman, Acosta, DeGrasse, JJ.

5004 Elsa Tavarez, et al., Index 2073/03
Plaintiffs-Appellants,

-against-

Patrick Oquendo, et al.,
Defendants-Respondents.

Law Office of Dino J. Domina, Garden City (Lisa M. Comeau of counsel), for appellants.

Cartafalsa, Slattery, Turpin & Lenoff, Tarrytown (Patricia A. Hughes of counsel), for respondents.

Judgment, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered October 17, 2007, upon a jury verdict in defendants' favor, dismissing the complaint, unanimously affirmed, without costs.

The accident in 2003 occurred when the rear of the tow truck driven by defendant Oquendo struck plaintiff Tavarez as she was about to open and enter the driver's door of her parked vehicle. On appeal, plaintiffs take issue with evidentiary rulings of the trial court and elements of its charge.

Plaintiffs complain that two eyewitnesses to the accident were not allowed to estimate the speed of defendant's truck in miles per hour. However, their counsel failed to preserve objection to such alleged error and actually stipulated to ask questions regarding the speed of the vehicle without numerical estimate in miles per hour. Both witnesses testified that the

vehicle was "flying" or going "fast," clearly implying that the vehicle was traveling in excess of the appropriate speed for these circumstances. Furthermore, the testimony elicited from the eyewitnesses showed that neither had witnessed the actual impact, and that both had viewed the scene from a considerable distance.

To the extent preserved, there is no merit to plaintiffs' other contentions regarding the jury charge. While there was no explicit reference to a duty to avoid hitting pedestrians, the court clearly conveyed that Oquendo was under a duty of reasonable care in the operation of his vehicle, which would include being aware of his surroundings and taking into account the actual and potential dangers existing from weather, road, traffic and other conditions. The court was not required to specifically charge PJI 2:76, regarding pedestrians walking alongside a roadway.

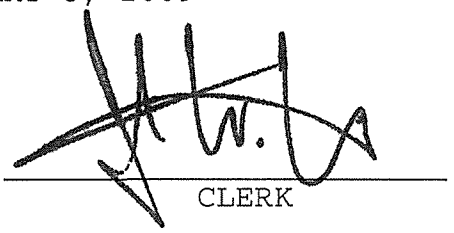
To the extent the record offers a basis for review, there were no material discrepancies between Oquendo's deposition and his trial testimony.

Finally, the verdict was not against the weight of the evidence. The jury clearly believed Oquendo's version, crediting his testimony that he had traveled past Tavarez at a low rate of speed during a snowstorm, and that it was Tavarez who had "miscalculated," opening her car door just as the truck was

passing. The fact that the truck was able to make a complete stop shortly after the impact also undermines the conclusion that it was traveling at an excessive rate of speed.

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

ENTERED: JANUARY 8, 2009



CLERK

Mazzarelli, J.P., Saxe, Friedman, Acosta, DeGrasse, JJ.

5005 Darrell R. Day, et al., Index 20485/06
Plaintiffs-Respondents,

-against-

Juan F. Santos, et al.,
Defendants-Appellants.

Marjorie Bornes, New York, for appellants.

Genser Dubow Genser & Cona, LLP, Melville (Jack H. Genser of counsel), for respondents.

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered March 26, 2008, which denied defendants' motion for summary judgment dismissing the complaint for lack of a serious injury within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

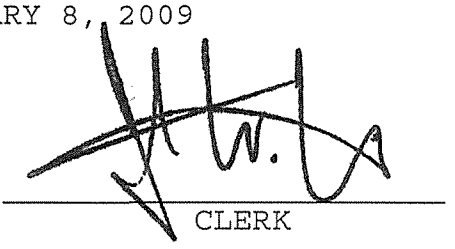
Defendants made a prima facie showing of their entitlement to summary judgment by submitting the affirmed report of an expert who examined plaintiff Rebecca Mattos and concluded, based upon objective tests conducted, that she had not suffered a permanent consequential limitation or a significant limitation (*see Onishi v N & B Taxi, Inc.*, 51 AD3d 594, 595 [2008]). Plaintiffs failed to raise a triable issue of fact with their expert's affirmed report finding limitations in Mattos's range of motion, as the expert's examination was conducted more than two

years after the accident (*see Ali v Kahn*, 50 AD3d 454, 455 [2008]; *Batts v Medical Express Ambulance Corp.*, 49 AD3d 294, 295 [2008]). Additionally, Mattos offered no explanation for the discontinuation of her treatment within six months after the accident (*see Pommells v Perez*, 4 NY3d 566, 574 [2005]).

Defendants also established prima facie that Mattos did not suffer a 90/180-day injury, and Mattos failed to raise a triable issue of fact, given her testimony that she went back to work immediately after the accident (*see Gorden v Tibulcio*, 50 AD3d 460, 463 [2008]; *Guadalupe v Blondie Limo, Inc.*, 43 AD3d 669, 670 [2007]).

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

ENTERED: JANUARY 8, 2009



CLERK

Mazzarelli, J.P., Saxe, Friedman, Acosta, DeGrasse, JJ.

5006 The People of the State of New York, Docket 45286C/06
Respondent,

-against-

Edward Williams,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Cheryl P. Williams of counsel), for appellant.

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

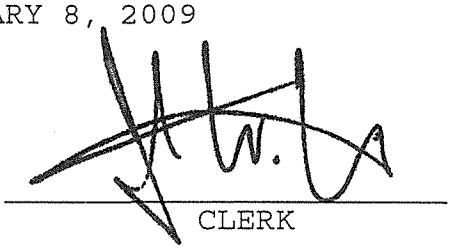
Judgment, Criminal Division of the Supreme Court, Bronx County (Efrain Alvarado, J.), rendered October 18, 2006, convicting defendant, after a nonjury trial, of attempted assault in the third degree and harassment in the second degree, and sentencing him to an aggregate term of 90 days, unanimously affirmed.

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

intent to injure the victim could be readily inferred from his violent conduct toward her.

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

ENTERED: JANUARY 8, 2009



CLERK

Mazzarelli, J.P., Saxe, Friedman, Acosta, DeGrasse, JJ.

5007 The People of the State of New York, Ind. 477/04
Respondent,

-against-

Kevin Carroll,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Rafael Curbelo of counsel), for respondent.

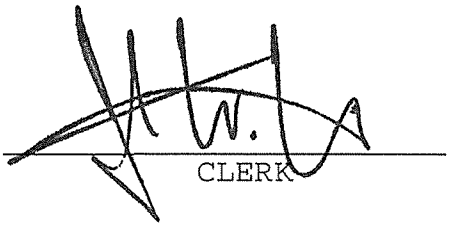
Judgment, Supreme Court, Bronx County (Efrain Alvarado, J.), rendered June 14, 2006, convicting defendant, after a jury trial, of attempted aggravated assault upon a police officer and resisting arrest, and sentencing him, as a second felony offender, to an aggregate term of 10 years, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved (*see People v Hawkins*, __ NY3d __, 2008 NY Slip Op 09254 [2008]), and we decline to review it in the interest of justice. As an alternate holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant's course of conduct warranted the inference that he intended to cause a police officer to land on a subway track as trains approached. The People's expert witness refuted any claim that

defendant lacked the mental capacity to form the requisite intent to cause serious physical injury to the officer.

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

ENTERED: JANUARY 8, 2009



Mazzarelli, J.P., Saxe, Friedman, Acosta, DeGrasse, JJ.

5008 Simpson Gray, Index 116607/04
Plaintiff-Appellant,

-against-

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

Simpson Gray, appellant pro se.

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

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered April 7, 2008, which, to the extent appealed from as limited by plaintiff's brief, denied his motion to compel defendants to answer his interrogatories, denied his motion for summary judgment on his breach of contract claim, and granted defendants' cross motion for leave to amend their answer and dismiss the complaint, unanimously affirmed, without costs.

Even assuming defendants' cross motion was untimely, plaintiff was not prejudiced by the minimal delay. The court was within its discretion in considering the cross motion, especially where plaintiff did not request additional time to respond (*Guzetti v City of New York*, 32 AD3d 234 [2006]).

Plaintiff's failure to include his notice of claim in his bankruptcy petition deprived him of the legal capacity to sue herein (*Whelan v Longo*, 7 NY3d 821 [2006]), even if the omission

was innocent (*see Dynamics Corp. of Am. v Marine Midland Bank-N.Y.*, 69 NY2d 191 [1987]). In that regard, it makes no difference that plaintiff filed for bankruptcy under Chapter 13 rather than Chapter 7 (*see Cable v Ivy Tech State Coll.*, 200 F3d 467, 472 [7th Cir 1999], citing Fed Rules Bankr Pro rule 6009).

Because we affirm the dismissal of the complaint, we do not reach plaintiff's argument that the court should have granted his motions for partial summary judgment and to compel discovery.

We have considered plaintiff's remaining argument and find it unavailing.

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

ENTERED: JANUARY 8, 2009

CLERK

Mazzarelli, J.P., Saxe, Friedman, Acosta, DeGrasse, JJ.

5009-
5010-
5011N Jaime Silva, Index 27519/03
Plaintiff, 83927/04
84525/05

-against-

F.R. Real Estate Development Corp., et al.,
Defendants.
- - - - - -
F.R. Real Estate Development Corp., et al.,
Third-Party Plaintiffs-Respondents,

N.Y. Enterprise Foundation,
Third-Party Plaintiff,

-against-

Galaxy General Contracting Corp.,
Third-Party Defendant.
- - - - - -
Galaxy General Contracting Corp.,
Second Third-Party Plaintiff-Respondent,

-against-

Zurich Specialties London Ltd.,
Second Third-Party Defendant-Appellant.

Ronald P. Berman, New York, for appellant.

Doyle & Broumand, LLP, Bronx (Michael B. Doyle of counsel), for Galaxy General Contracting Corp., respondent.

John T. Ryan & Associates, Riverhead (Robert F. Horvat of counsel), for F.R. Real Estate Development Corp., and Neighborhood Partnership Housing Development Fund Company, Inc., respondents.

Judgment, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered on or about July 19, 2007, in a declaratory judgment action to resolve an insurance coverage dispute, inter

alia, granting the motion of third-party defendant/second third-party plaintiff Galaxy General Contracting Corp. (Galaxy) to reargue an order of the same court and Justice, entered January 31, 2007, and, upon reargument, directing second third-party defendant Zurich Specialties London Ltd. (Zurich) to immediately defend and indemnify Galaxy and third-party plaintiffs F.R. Real Estate Development Corp. (FR Real Estate) and Neighborhood Partnership Housing Development Fund Co., Inc. (Neighborhood) in an underlying personal injury action, and directing the Clerk, upon payment of fees and the filing of a notice of trial/inquest, to set a date for the determination of legal fees, costs, and expenses due Galaxy as a result of Zurich's refusal to defend and indemnify, and bringing up for review an order, same court and Justice, entered July 9, 2007, which, inter alia, granted Galaxy's motion to reargue the prior order, entered January 31, 2007, and, upon reargument, modified the prior order to find that there were no issues of fact with respect to the deletion of the exclusions in the subject insurance policy, or with respect to whether Zurich received timely notification of the underlying action, and granted Galaxy's request for an order of indemnification and defense, unanimously modified, on the law, to vacate that portion of the judgment directing the Clerk to set a date for determination of legal fees, costs, and expenses, and otherwise affirmed, without costs. Appeal from above order

entered July 9, 2007, unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Order, same court and Justice, entered June 9, 2008, which, upon granting the motion of FR Real Estate and Neighborhood to modify an order of the same court and Justice, entered January 12, 2007, so as to award FR Real Estate as well as Neighborhood a grant of conditional indemnification as against Galaxy, and impliedly denying Zurich's motion to vacate the above judgment, directed that Zurich defend and indemnify Galaxy, FR Real Estate, and Neighborhood in the underlying action, unanimously affirmed, without costs.

The court properly directed Zurich to defend and indemnify Galaxy, FR Real Estate and Neighborhood in the underlying action. The record establishes that the subject policy afforded coverage to Galaxy, and that the liability exclusions in the policy relied upon by Zurich had been deleted from the policy. Furthermore, under the circumstances presented, the delay in notifying Zurich of the third-party action was not unreasonable as a matter of law.

However, we modify the judgment to the extent indicated, since the law "is well established that an insured may not recover the expenses incurred in bringing an affirmative action against an insurer to settle its rights under the policy" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 324 [1995]; *West 56th St. Assoc. v Greater N.Y. Mut. Ins. Co.*, 250 AD2d 109, 114

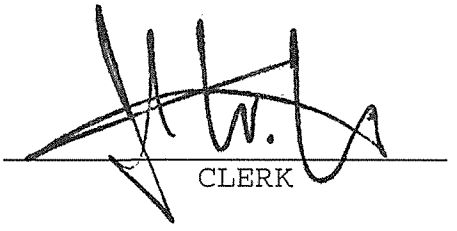
[1998]). Accordingly, there could be no basis for the award of "legal fees, costs, and expenses" as recited in the judgment, and there would be no purpose in holding a trial on whether these amounts may be recovered.

Regarding the June 9, 2008 order, the court properly corrected its prior order to find that FR Real Estate, as well as Neighborhood, was entitled to a defense and indemnification by Zurich (CPLR 5019). Contrary to Zurich's contention, the issue of indemnification was before the court by way of Zurich's application to vacate the July 2007 judgment.

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

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

ENTERED: JANUARY 8, 2009



CLERK

Mazzarelli, J.P., Saxe, Friedman, Acosta, DeGrasse, JJ.

5012 L.M.V., Index 17548/05
Plaintiff-Appellant,

-against-

Cazenovia College,
Defendant-Respondent,

Joel O. Benn,
Defendant.

John J. Appell, New York, for appellant.

Quirk and Bakalor, P.C., New York (Jeanne M. Boyle of counsel), for respondent.

Order, Supreme Court, Bronx County (John A. Barone, J.), entered October 23, 2007, which granted defendant Cazenovia's motion for a change of venue, unanimously affirmed, without costs.

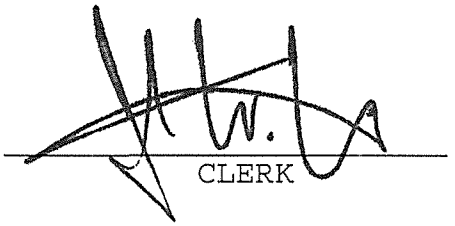
Plaintiff, a student at Cazenovia College, was purportedly raped by another student. She commenced this action against the other student and the school, alleging, in part, the latter's negligence with regard to its security measures. Cazenovia successfully moved to change venue to Madison County, where the school is located.

The motion was brought in a reasonably timely fashion (CPLR 511[a]; *see also Gissen v Boy Scouts of Am.*, 26 AD3d 289 [2006]). Any delay was due to a dispute Cazenovia was having with its insurance carrier over coverage, and the motion was made shortly

after new counsel was substituted. Moreover, discovery was far from complete, and there is no indication of any prejudice to plaintiff. Cazenovia is entitled to a discretionary change in venue under CPLR 510(3), having demonstrated the convenience of Madison County to certain identified witnesses whose testimony will be material to the case (*see Williamsburg Steel Prods. Co. v Shevlin-Manning, Inc.*, 90 AD2d 550 [1982]).

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

ENTERED: JANUARY 8, 2009



SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
David Friedman
John W. Sweeny, Jr.
Karla Moskowitz, JJ.

3557
Ind. 114693/05

Joseph I. Rosenzweig,
Plaintiff-Respondent,

-against-

Radiah K. Givens,
Defendant-Appellant.

Defendant appeals from an order of the Supreme Court, New York County (Barbara R. Kapnick, J.), entered October 4, 2007, which granted plaintiff summary judgment on his claim to foreclose certain mortgages, dismissed defendant's first, second and third affirmative defenses and two counterclaims, and struck her claim for punitive damages.

Law Offices of Barbara H. Katsos, P.C., New York (Barbara H. Katsos of counsel), for appellant.

Marc E. Elliott, New York, for respondent.

MOSKOWITZ, J.

Given the highly unusual circumstances of this case, we do not believe that the motion court should have granted summary judgment to plaintiff at this early juncture, prior to discovery. Plaintiff Joseph Rosenzweig commenced this action to foreclose on two mortgages he issued to defendant Radiah Givens on May 10, 2002, in connection with the balance due on defendant's alleged purchase of a condominium apartment. The apartment secured the loans. It is undisputed that defendant herself has never made a mortgage payment.

However, these were no ordinary, arms-length mortgages. At the time plaintiff, an attorney, issued the mortgages, he was involved in a romantic relationship with defendant, a student 19 years younger. Unlike most mortgage transactions, it was plaintiff who paid the 10% down payment on the property. After the closing, plaintiff also paid the carrying costs on the apartment and most household expenses.

Plaintiff had his long-term friend and colleague, attorney Thomas Gazianis, represent defendant at the apartment's closing and both plaintiff and defendant in connection with the loans. At or directly after the May 10, 2002 closing, the parties signed a letter, as "accepted and agreed to," acknowledging Gazianis's joint representation in connection with plaintiff's loans to

defendant, and of defendant in connection with her purchase of the apartment. Gazianis noted in the letter that he had a prior social and working relationship with plaintiff and recommended that both parties obtain separate counsel as a potential conflict existed. The letter also described the transaction between the parties as two mortgage loans being made to defendant "by Joseph I. Rosenzweig, in the combined amount of $285,300, and in connection with the mortgage and Note [defendant] has given to Mr. Rosenzweig therewith."

Unbeknownst to defendant at the time, plaintiff was married with children.

Almost two years later, on or about April 13, 2004, the parties married in Jamaica. Plaintiff was still married to another woman. The Marriage Register reflects that plaintiff identified himself as a bachelor and attorney. On April 19, 2005, plaintiff forged defendant's signature on a loan application for $150,000 that the apartment was to secure.

Plaintiff did not record the second mortgage until July 7, 2005, over three years after the closing. Defendant contends that plaintiff did this after she had found out that he had forged her signature on the loan application and after plaintiff's bigamous marriage became known to plaintiff's first wife. Plaintiff contends that he did not record the second

mortgage until three years later to avoid certain taxes.

Eventually, defendant discovered that plaintiff was already married. In February 2007, the parties' bigamous marriage was annulled.

Defendant contends that the apartment was a gift to her from plaintiff. She contends that she was a student at the time of the transaction and that plaintiff knew she could not make the monthly payments. In support, defendant points out that the plaintiff paid the monthly expenses on the apartment including maintenance, household and related charges. Defendant also notes that plaintiff never asked her for mortgage payments until after she discovered his duplicity. Defendant explains that plaintiff induced her to sign the mortgage documents by claiming her signature was necessary to effectuate the gift. She says she never questioned this because he was a lawyer and she loved and trusted him. She claims she never would have signed had she known these were mortgage documents because she could not afford to make the monthly payments.

In her answer, defendant asserted affirmative defenses sounding in fraud and bad faith and two counterclaims. The first counterclaim is for fraudulent inducement to marry. The second counterclaim relates to plaintiff's fraud in inducing her to

enter into the mortgage agreements and his forgery of her name on a bank loan.

Plaintiff argues that the mortgage terms are clear and unambiguous and cannot be reasonably read to indicate anything other than a loan. However, "[a]greements between spouses, unlike ordinary business contracts, involve a fiduciary relationship requiring the utmost of good faith" (*Christian v Christian*, 42 NY2d 63, 72 [1977]). Thus, courts exercise strict surveillance of agreements between spouses (*see e.g. Levine v Levine*, 56 NY2d 42, 47 [1982]; *Barchella v Barchella*, 44 AD3d 696, 697 [2007]). Although the parties were not married on the day defendant signed the mortgage agreements, their relationship, as their eventual marriage demonstrates, was sufficiently analogous to at least raise a question as to whether or not a fiduciary relationship existed to raise the level of scrutiny of this transaction to one of strict surveillance (*see Matter of Greiff*, 92 NY2d 341, 347 [1998] [noting "the unique character of the inchoate bond between prospective spouses" and that "these relationships are almost universally beyond the pale of ordinary commercial transactions," court required "exceptional scrutiny" in evaluating prenuptial agreement]; *Brody v Brody*, 20 Misc 3d 350, 356-357 [Sup Ct, Nassau County 2008] [applying standard to prenuptial agreement]). Thus, defendant has detailed

circumstances that raise an issue of fact about whether a fiduciary relationship existed between the parties, including their romantic involvement that resulted in a marriage (albeit a sham one because plaintiff was a bigamist), their age difference and that plaintiff was a lawyer.

Reasoning that these were mortgage documents, the motion court, without discovery, dismissed defendant's claims that she was fraudulently induced to sign them on the ground that her allegations did not rise to the level of fraud. However, this analysis fails to take into account the highly unusual circumstances of this case and fails to apply the level of scrutiny appropriate considering the relationship between these parties. Given the surrounding circumstances, especially the nature of the parties' relationship, defendant has sufficiently raised an issue of fact about whether plaintiff tricked her into signing the mortgage documents by claiming they were merely a formality to effectuate his gift to her. That defendant did not have her own lawyer, but relied on a friend of plaintiff, further

raises questions about this transaction (*see Bartlett v Bartlett*, 84 AD2d 800 [1981] [separation agreement was product of "overreaching" where one attorney represented both husband and wife but acted "essentially as the defendant husband's attorney"]). At the very least, the motion court should not have granted summary judgment without affording defendant discovery.

The dissent argues that defendant fully understood the nature of the transaction because she signed a letter, dated May 10, 2002, from plaintiff's attorney/friend that informed her about the nature of the transaction and advised her to obtain separate counsel. However, as cases have repeatedly held, agreements between spouses or prospective spouses, unlike ordinary business contracts, involve a fiduciary relationship requiring the utmost good faith (*see Christian v Christian*, 42 NY2d 63, 72 [1977]; *see also Matter of Grieff*, 92 NY2d 341, 347 [1998]; *Colello v Collello*, 9 AD3d 855, 859 [2004]). Given the relationship here, and the surrounding circumstances, it was inappropriate to grant relief to the plaintiff without closely scrutinizing the agreement, including further development of the record.

Marmelstein v Kehillat New Hempstead: Rav Aron Jofen Community Synogogue, 11 NY3d 15 (2008) is not to the contrary. In that case, the Court of Appeals held that there was no

fiduciary relationship between a congregant and the rabbi of the synagogue. The plaintiff had claimed that the rabbi had induced her into a 3½ year intimate relationship by suggesting that his "therapy" would help her find a husband. The Court held that there was no fiduciary relationship between the rabbi and the congregant because no cause of action could be maintained "for an extended voluntary sexual affair between consenting adults" (*id.* at 22). Here, by contrast, the parties held themselves out as husband and wife and defendant at least believed they were husband and wife.

The record also contains indications that plaintiff did intend the apartment as a gift. For example, plaintiff did not demand payment from defendant for three years and then not until their relationship was disintegrating because defendant had discovered that plaintiff had forged her signature on a loan application and had another wife. While recognizing that the mortgage documents contain non-waiver clauses, the timing of plaintiff's demand for payment is suspicious. Moreover, it would be unusual for someone who intended to make a loan to also provide the down payment, pay the maintenance and pay most other household expenses. Because of the relationship between the parties, plaintiff presumably would have known that defendant could not afford the mortgages. Given that the marriage was a

sham and that plaintiff forged defendant's signature on a loan application for $150,000, it is plausible that plaintiff did trick defendant into thinking he was gifting her the apartment in an elaborate plot to obtain loan proceeds under her name.

It was also error to dismiss defendant's first counterclaim for deceit in the inducement to enter a void marriage. Accepting as true defendant's allegations that plaintiff falsely misrepresented himself to be single, thereby inducing her to enter into a bigamous marriage, change her status and sustain damages, defendant has stated a cause of action *(see Tuck v Tuck*, 14 NY2d 341, 344 [1964]).

However, the court was correct to dismiss defendant's second affirmative defense that plaintiff waived his claims under the mortgages because he did not demand payment for over a three-year period. This is because the mortgage documents contain unambiguous non-waiver clauses that courts uniformly enforce (*see e.g. Awards.com v Kinko's, Inc.* 42 AD3d 178, 188, [2007] *lv dismissed*, 9 NY3d 1025 [2008]). Nevertheless, as explained above, an issue of fact remains as to whether the mortgages are enforceable in the first instance. We have considered appellants' remaining arguments and find them unavailing.

Accordingly, the order of the Supreme Court, New York County (Barbara R. Kapnick, J.), entered October 4, 2007, which granted plaintiff summary judgment on his claim to foreclose on certain mortgages, dismissed defendant's first, second and third affirmative defenses and two counterclaims, and struck defendant's claim for punitive damages, should be modified, on the law, to deny plaintiff's motion for summary judgment on his foreclosure claim, reinstate the first and second counterclaims and reinstate the first affirmative defense, and otherwise affirmed, without costs.

All concur except Friedman, J. who dissents in part in an Opinion.

FRIEDMAN, J. (dissenting in part)

I concur with the majority in reinstating the first counterclaim asserted by defendant Radiah K. Givens against plaintiff Joseph I. Rosenzweig, which seeks damages for fraudulent inducement to enter into an invalid marriage (*see Tuck v Tuck*, 14 NY2d 341 [1964]). However, substantially for the reasons stated by Supreme Court (Barbara R. Kapnick, J.) in its decision dated July 11, 2007, I would, unlike the majority, affirm the order appealed from insofar as it (1) granted summary judgment to plaintiff on his cause of action to foreclose on two mortgage loans he made to defendant, (2) dismissed defendant's first affirmative defense of fraudulent inducement, and (3) dismissed defendant's second counterclaim for rescission of the mortgages.[1]

In a transaction that closed on May 10, 2002, defendant purchased a condominium from third-party sellers using the proceeds of a loan from plaintiff. The loan was secured by two mortgages on the condominium. It is undisputed that the parties had an intimate relationship at the time of the transaction. That relationship led to an invalid marriage about two years after the purchase of the condominium. The marriage has since

---

[1]I concur with the majority's affirmance of the dismissal of defendant's second and third affirmative defenses.

been annulled, and the parties' relationship has ended.

In this action, plaintiff seeks to foreclose on the mortgages. On his motion for summary judgment, plaintiff established that defendant has defaulted under the terms of the loan. Defendant does not dispute the facts establishing her default, but asserts the affirmative defense of fraudulent inducement, claiming that plaintiff led her to believe that he was giving her the condominium as a gift. Defendant also asserts a counterclaim for rescission of the mortgages based on her claim of fraudulent inducement.

I agree with the motion court that, on this record, defendant's claim of fraudulent inducement is untenable as a matter of law. In particular, I note that defendant's claim that she did not understand the nature of the transaction is conclusively refuted by her countersignature on a letter to the parties from the attorney who represented both of them at the closing. That letter, dated May 10, 2002 (the May 10 letter), states (emphases added):

> "Re: *Loan from Rosenzweig to Givens* and Mortgage given in connection with same; Purchase of Givens Coop [*sic*] Apartment 3A at 181 Seventh Avenue New York, New York 10011
>
> "Dear Ms. Givens and Mr. Rosenzweig:
>
> "This is to confirm that you have both retained me,

> Thomas L. Gazianis, as your attorney. I am Ms. Givens' attorney with respect to the transfer of the referenced apartment from [the sellers] to Radiah K. Givens, as Purchaser. I am also Ms. Givens' attorney with respect to *the First and Second Mortgage Loans being made to her by Joseph I. Rosenzweig*, in the combined amount of $285,300, and in connection with the mortgage and Note Ms. Givens has given to Mr. Rosenzweig therewith. I am also Mr. Rosenzweig's attorney *in his capacity as lender and mortgagee with respect to the $285,300 loan and mortgage referenced above*. I have also worked with Joseph I. Rosenzweig before and have a friendship relationship with him.
>
> "You understand that I am representing both of you in connection with the loan transaction, so the potential for a conflict of interest exists should a dispute arise between you. Since my loyalties are divided two ways, I have advised both of you to obtain separate counsel.
>
> "Nevertheless, you have specifically refused to obtain such separate counsel and do hereby waive any claim you may have or may develop in the future with respect to any conflict of interest on my part."

At the end of the May 10 letter, the signatures of plaintiff and defendant appear beneath the legend "ACCEPTED AND AGREED TO." The May 10 letter is not discussed either in defendant's pleading or in her affidavit opposing summary judgment. The majority's supposition that the May 10 letter may have been signed by the parties "directly after" the closing, rather than at the closing itself, finds no evidentiary support in the record.

In light of defendant's undisputed acceptance of the terms of the May 10 letter, and for the other reasons discussed in the motion court's decision, I respectfully dissent to the extent the

majority modifies the order appealed from to deny plaintiff summary judgment on his foreclosure claim and to reinstate defendant's first affirmative defense and second counterclaim. To reiterate, defendant's signature on the May 10 letter conclusively negates her claim that she did not understand that plaintiff was *lending* her the $285,300 that was used to purchase the condominium in her name. Tellingly, defendant's pleading and affidavit opposing summary judgment do not even try to explain away her signature on the May 10 letter. Nonetheless, the majority, essentially ignoring both the May 10 letter and defendant's silence about it, overturns the motion court's well-considered decision and reinstates defendant's fraudulent inducement affirmative defense and counterclaim.

The majority's attempt to justify its action by reference to fiduciary principles is not persuasive. The plain-English May 10 letter establishes that defendant, a person who has attended college and does not claim to suffer from any disability, understood the nature of the transaction, and had been advised that she should obtain a lawyer of her own. In this regard, I note that defendant was 29 years old at the time of the transaction. The majority sees fit to mention that plaintiff is 19 years older than defendant, but I fail to see how the age difference furnishes grounds for excusing defendant from

obligations she freely undertook. It should also be noted that, while defendant's answer alleges that "[s]he didn't understand what a mortgage was," this dubious claim is not repeated in defendant's affidavit opposing summary judgment.

In a nutshell, if defendant knew that plaintiff was lending her the money for the purchase of the condominium, her fraudulent inducement claim collapses. The majority does not dispute this, and even admits that the May 10 letter "informed [defendant] about the nature of the transaction and advised her to obtain separate counsel." Thus, there is no logically coherent basis for sustaining the fraudulent inducement claim. This being the case, an observer might reasonably conclude that the majority's disposition of this appeal is motivated by a desire to punish plaintiff for being a scoundrel. Certainly, the picture of plaintiff's character emerging from the record and briefs on this appeal supports such a conclusion, and plaintiff, an attorney, has been referred to the Departmental Disciplinary Committee based on his invalid marriage to defendant. Plaintiff's deficiencies of character do not, however, justify a refusal to apply clear legal principles that plainly govern the case. While the majority states that discovery is required to determine whether defendant's fraudulent inducement claim has merit, defendant herself -- who has direct personal knowledge of the

transaction at issue -- makes no argument that any discovery is needed, and repeatedly expresses the desire to go to trial. On the facts established by this record, she could not prevail at trial, as a matter of law, on her fraudulent inducement claim.

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

ENTERED: JANUARY 8, 2009